

NORTH CAROLINA  
COURT OF APPEALS  
REPORTS

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**82 N.C. App.**

## TABLE OF CONTENTS

|  |       |
|--|-------|
| Judges of the Court of Appeals .....                     | v     |
| Superior Court Judges .....                              | vi    |
| District Court Judges .....                              | viii  |
| Attorney General.....                                    | xii   |
| District Attorneys .....                                 | xiii  |
| Public Defenders .....                                   | xiv   |
| Table of Cases Reported .....                            | xv    |
| Cases Reported Without Published Opinion.....            | xix   |
| General Statutes Cited and Construed .....               | xxii  |
| Rules of Evidence Cited and Construed .....              | xxv   |
| Rules of Civil Procedure Cited and Construed .....       | xxvi  |
| Constitution of United States Cited and Construed .....  | xxvii |
| Constitution of North Carolina Cited and Construed ..... | xxvii |
| Rules of Appellate Procedure Cited and Construed .....   | xxvii |
| Opinions of the Court of Appeals .....                   | 1-764 |
| Analytical Index.....                                    | 767   |
| Word and Phrase Index .....                              | 798   |





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| 15B | F. GORDON BATTLE       | Chapel Hill   |
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| 27B | JOHN MULL GARDNER    | Shelby        |
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# CASES REPORTED

|  | PAGE |  | PAGE |
|--|------|--|------|
| Adkins v. Adkins   | 289  | Davidson, Atlantic Ins.<br>& Realty Co. v.                         | 251  |
| All Star Mills, Inc., Lowder v.                            | 470  | Dept. of Trans. v. Byrum   | 96   |
| Allen v. Pullen  | 61   | Dept. of Transportation<br>v. Higdon                               | 752  |
| Allstate Insurance Co. v.<br>Nationwide Ins. Co.           | 366  | Dept. of Transportation v.<br>Quick As A Wink                      | 755  |
| Alston, S. v.  | 372  | Dillingham v. Yeargin<br>Construction Co.                          | 684  |
| Altman v. Munns  | 102  | Draughon v. Draughon   | 738  |
| American & Efird Mills, Clark v.                           | 192  | Duke Power Co., In re Appeal of                                    | 492  |
| Anderson Chevrolet-Olds, Inc.,<br>McCracken v.             | 521  | Durham Highway Fire<br>Protection Assoc. v. Baker                  | 583  |
| Atlantic Ins. & Realty Co.<br>v. Davidson                  | 251  | E. L. Scott Roofing Co. v.<br>State of N. C.                       | 216  |
| B & P Motor Lines, Inc.,<br>Reeves v.                      | 562  | East Carolina Oil Transport v.<br>Petroleum Fuel &<br>Terminal Co. | 746  |
| Baby Boy Shamp, In re                                      | 606  | East Coast Machine & Iron<br>Works, Queensboro<br>Steel Corp. v.   | 182  |
| Badgett, S. v.   | 270  | Emerald Isle, Town of, White v.                                    | 392  |
| Baker, Durham Highway Fire<br>Protection Assoc. v.         | 583  | Employment Security Comm.,<br>In re Poteat v.                      | 138  |
| Baker, Kinney v.   | 126  | Estee Co. v. Goodman   | 692  |
| Baker v. Mauldin   | 404  | Finger, Peterson v.  | 743  |
| Barbee, Seiler v.  | 640  | Flaherty v. Hunt   | 112  |
| Barbee, Wagner v.  | 640  | Forsyth County Hospital<br>Authority, Inc. v. Sales                | 265  |
| Beeson v. McDonald   | 669  | Foster v. Western Electric Co.                                     | 656  |
| Benfield v. Pilot Life Ins. Co.                            | 293  | Friday's, Inc., Maddox v.  | 145  |
| Blankenship, S. v.   | 285  | Furr v. Carmichael   | 634  |
| Bottomley v. Bottomley                                     | 231  | G.C.S. Electronics, Collector<br>Cars of Nags Head, Inc. v.        | 579  |
| Brisson v. Williams  | 53   | Goodman, Estee Co. v.  | 692  |
| Britt v. Britt   | 303  | Gore Brothers, Stanley v.  | 511  |
| Brooks v. Rogers   | 502  | Griggs v. Morehead<br>Memorial Hospital                            | 131  |
| Bryson City, Town of, McNabb v.                            | 385  | Gunby v. Pilot Freight<br>Carriers, Inc.                           | 427  |
| Bullard, S. v.   | 718  | Guy, Masterclean of<br>North Carolina v.                           | 45   |
| Byrum, Dept. of Trans. v.                                  | 96   | Harper, S. v.  | 398  |
| CAMA Permit, In re Appeal of                               | 32   | Hartman v. Hartman   | 167  |
| Cannon Mills Co., Knight v.                                | 453  |  |      |
| Carmichael, Furr v.  | 634  |  |      |
| Charlotte, City of, v. Rousso                              | 588  |  |      |
| Ciba-Geigy Corp., Tyson v.                                 | 626  |  |      |
| City of Charlotte v. Rousso                                | 588  |  |      |
| Clark v. American & Efird Mills                            | 192  |  |      |
| Collector Cars of Nags Head, Inc.<br>v. G.C.S. Electronics | 579  |  |      |
| Conrad v. Conrad   | 758  |  |      |
| Cook v. Southern Bonded, Inc.                              | 277  |  |      |
| Crews, State ex rel., v. Parker                            | 419  |  |      |
| Cullerton, Hitchcock v.                                    | 296  |  |      |
| Cutchin, Holiday v.  | 660  |  |      |

# CASES REPORTED

|                                      | PAGE |                                      | PAGE |
|--------------------------------------|------|--------------------------------------|------|
| Hays, West v. ....                   | 574  | Lyerly v. Malpass .....              | 224  |
| Higdon, Dept. of                     |      | Lyon Stores, Jones v. ....           | 438  |
| Transportation v. ....               | 752  |                                      |      |
| Hitchcock v. Cullerton .....         | 296  | McCracken v. Anderson                |      |
| Hochheiser v. N. C. Dept.            |      | Chevrolet-Olds, Inc. ....            | 521  |
| of Transportation .....              | 712  | McDonald, Beeson v. ....             | 669  |
| Hodges, Laurel Park Villas           |      | McMurray v. Surety Federal           |      |
| Homeowners Assoc. v. ....            | 141  | Savings & Loan Assoc. ....           | 729  |
| Hoke, Schuch v. ....                 | 445  | McNabb v. Town of Bryson City ..     | 385  |
| Holiday v. Cutchin .....             | 660  |                                      |      |
| Holloway, S. v. ....                 | 586  | Maddox v. Friday's, Inc. ....        | 145  |
| Howell v. Waters .....               | 481  | Mallard Lakes Assn., Prince v. ....  | 431  |
| Hughes, S. v. ....                   | 724  | Malpass, Lyerly v. ....              | 224  |
| Humphries, S. v. ....                | 749  | Manus, In re .....                   | 340  |
| Hunt, Flaherty v. ....               | 112  | Masciulli v. Tucker .....            | 200  |
| Hurst, S. v. ....                    | 1    | Massey, Nationwide                   |      |
|                                      |      | Mut. Ins. Co. v. ....                | 448  |
| In re Adoption of Searle .....       | 273  | Masterclean of North                 |      |
| In re Appeal of CAMA Permit ....     | 32   | Carolina v. Guy .....                | 45   |
| In re Appeal of Duke Power Co. ....  | 492  | Mauldin, Baker v. ....               | 404  |
| In re Appeal of Medical Center ....  | 414  | Medical Center, In re Appeal of ...  | 414  |
| In re Baby Boy Shamp .....           | 606  | Moore v. N. C. Farm Bureau           |      |
| In re Manus .....                    | 340  | Mut. Ins. Co. ....                   | 616  |
| In re Petition of Kermit Smith ....  | 107  | Moorman, S. v. ....                  | 594  |
| In re Poteat v. Employment           |      | Morehead Memorial Hospital,          |      |
| Security Comm. ....                  | 138  | Griggs v. ....                       | 131  |
| In re Stewart Children .....         | 651  | Morgan, S. v. ....                   | 674  |
| In re Will of Leonard .....          | 646  | Motor Convoy, Inc., Pickrell v. .... | 238  |
|                                      |      | Munns, Altman v. ....                | 102  |
| Jackson v. L. G. DeWitt              |      | Myers, S. v. ....                    | 299  |
| Trucking Co. ....                    | 208  |                                      |      |
| Jerson, O'Herron v. ....             | 434  | Nationwide Ins. Co., Allstate        |      |
| Jones v. Lyon Stores .....           | 438  | Insurance Co. v. ....                | 366  |
|                                      |      | Nationwide Mut. Fire Ins.            |      |
| Kermit Smith, In re Petition of .... | 107  | Co. v. Pittman .....                 | 756  |
| King v. N. C. State Bd. of           |      | Nationwide Mut. Ins. Co.             |      |
| Sanitarian Examiners .....           | 409  | v. Massey .....                      | 448  |
| Kinney v. Baker .....                | 126  | N. C. Dept. of Human                 |      |
| Knight v. Cannon Mills Co. ....      | 453  | Resources, Thorne v. ....            | 548  |
|                                      |      | N. C. Dept. of Transportation,       |      |
| L. G. DeWitt Trucking Co.,           |      | Hochheiser v. ....                   | 712  |
| Jackson v. ....                      | 208  | N. C. Farm Bureau Mut.               |      |
| Laurel Park Villas Homeowners        |      | Ins. Co., Moore v. ....              | 616  |
| Assoc. v. Hodges .....               | 141  | N. C. Finishing Co., Long v. ....    | 568  |
| Leonard, In re Will of .....         | 646  | N. C. Private Protective             |      |
| Lewis, Swindell v. ....              | 423  | Services Bd., Shipman v. ....        | 441  |
| Long v. N. C. Finishing Co. ....     | 568  | N. C. State Bar v. Whitted .....     | 531  |
| Lowder v. All Star Mills, Inc. ....  | 470  | N. C. State Bd. of Sanitarian        |      |
|                                      |      | Examiners, King v. ....              | 409  |

# CASES REPORTED

|                                       | PAGE |                                      | PAGE |
|---------------------------------------|------|--------------------------------------|------|
| N. C., State of, E. L. Scott          |      | Sanders v. Spaulding and             |      |
| Roofing Co. v. ....                   | 216  | Perkins, Ltd. ....                   | 680  |
| NCNB v. Powers .....                  | 540  | Schiller v. Scott .....              | 90   |
| Newell, S. v. ....                    | 707  | Schneider, Wohlfahrt v. ....         | 69   |
| Newton, S. v. ....                    | 555  | Schuch v. Hoke .....                 | 445  |
| Nimocks, Stevens v. ....              | 350  | Scott, Schiller v. ....              | 90   |
| O'Herron v. Jerson .....              | 434  | Searle, In re Adoption of .....      | 273  |
| Oliver, S. v. ....                    | 135  | Seifert v. Seifert .....             | 329  |
| Parker, State ex rel. Crews v. ....   | 419  | Seiler v. Barbee .....               | 640  |
| Peak v. Peak .....                    | 700  | Shamp, In re Baby Boy .....          | 606  |
| Peterson v. Finger .....              | 743  | Shipman v. N. C. Private             |      |
| Petroleum Fuel & Terminal             |      | Protective Services Bd. ....         | 441  |
| Co., East Carolina Oil                |      | Shuford, Woodruff v. ....            | 260  |
| Transport v. ....                     | 746  | Siegfried Corp., S. v. ....          | 678  |
| Pickrell v. Motor Convoy, Inc. ....   | 238  | Smith, Kermit, In re Petition of ... | 107  |
| Pilot Freight Carriers,               |      | Smith v. Williams .....              | 672  |
| Inc., Gunby v. ....                   | 427  | South & South Rentals,               |      |
| Pilot Life Ins. Co., Benfield v. .... | 293  | Williams v. ....                     | 378  |
| Pittman, Nationwide Mut.              |      | South Carolina Ins. Co. v. White ..  | 122  |
| Fire Ins. Co. v. ....                 | 756  | Southern Bonded, Inc., Cook v. ....  | 277  |
| Poole, S. v. ....                     | 117  | Southern Watch Supply Co. v.         |      |
| Poteat, In re, v. Employment          |      | Regal Chrysler-Plymouth ....         | 21   |
| Security Comm. ....                   | 138  | Spaulding and Perkins, Ltd.,         |      |
| Powers, NCNB v. ....                  | 540  | Sanders v. ....                      | 680  |
| Prince v. Mallard Lakes Assn. ....    | 431  | Spaulding and Perkins, Ltd.,         |      |
| Pullen, Allen v. ....                 | 61   | Spence v. ....                       | 665  |
| Queensboro Steel Corp. v.             |      | Spence v. Spaulding and              |      |
| East Coast Machine                    |      | Perkins, Ltd. ....                   | 665  |
| & Iron Works .....                    | 182  | Stanley v. Gore Brothers .....       | 511  |
| Quick As A Wink, Dept. of             |      | S. v. Alston .....                   | 372  |
| Transportation v. ....                | 755  | S. v. Badgett .....                  | 270  |
| Reavis v. Reavis .....                | 77   | S. v. Blankenship .....              | 285  |
| Reeves v. B & P Motor                 |      | S. v. Bullard .....                  | 718  |
| Lines, Inc. ....                      | 562  | S. v. Harper .....                   | 398  |
| Regal Chrysler-Plymouth,              |      | S. v. Holloway .....                 | 586  |
| Southern Watch                        |      | S. v. Hughes .....                   | 724  |
| Supply Co. v. ....                    | 21   | S. v. Humphries .....                | 749  |
| Rice v. Wood .....                    | 318  | S. v. Hurst .....                    | 1    |
| Roberts, S. v. ....                   | 733  | S. v. Moorman .....                  | 594  |
| Rogers, Brooks v. ....                | 502  | S. v. Morgan .....                   | 674  |
| Rouso, City of Charlotte v. ....      | 588  | S. v. Myers .....                    | 299  |
| Sales, Forsyth County                 |      | S. v. Newell .....                   | 707  |
| Hospital Authority v. ....            | 265  | S. v. Newton .....                   | 555  |
|                                       |      | S. v. Oliver .....                   | 135  |
|                                       |      | S. v. Poole .....                    | 117  |
|                                       |      | S. v. Roberts .....                  | 733  |
|                                       |      | S. v. Siegfried Corp. ....           | 678  |
|                                       |      | S. v. Teasley .....                  | 150  |

# CASES REPORTED

|                                     | PAGE |                                       | PAGE |
|-------------------------------------|------|---------------------------------------|------|
| S. v. Thomas .....                  | 682  | Wagner v. Barbee .....                | 640  |
| S. v. Warren .....                  | 84   | Warren, S. v. ....                    | 84   |
| S. v. White .....                   | 358  | Waters, Howell v. ....                | 481  |
| S. v. Williams .....                | 281  | West v. Hays .....                    | 574  |
| S. v. Wright .....                  | 450  | Western Electric Co.,                 |      |
| State ex rel. Crews v. Parker ..... | 419  | Foster v. ....                        | 656  |
| State of N. C., E. L. Scott         |      | White, South Carolina Ins. Co. v. . . | 122  |
| Roofing Co. v. ....                 | 216  | White, S. v. ....                     | 358  |
| Stevens v. Nimocks .....            | 350  | White v. Town of Emerald Isle . . .   | 392  |
| Stewart Children, In re .....       | 651  | Whitted, N. C. State Bar v. ....      | 531  |
| Surety Federal Savings & Loan       |      | Williams, Brisson v. ....             | 53   |
| Assoc., McMurray v. ....            | 729  | Williams, Smith v. ....               | 672  |
| Swindell v. Lewis .....             | 423  | Williams v. South &                   |      |
|                                     |      | South Rentals .....                   | 378  |
| Teasley, S. v. ....                 | 150  | Williams, S. v. ....                  | 281  |
| Thomas, S. v. ....                  | 682  | Wohlfahrt v. Schneider .....          | 69   |
| Thorne v. N. C. Dept. of            |      | Woncik v. Woncik .....                | 244  |
| Human Resources .....               | 548  | Wood, Rice v. ....                    | 318  |
| Town of Bryson City, McNabb v. . .  | 385  | Woodruff v. Shuford .....             | 260  |
| Town of Emerald Isle, White v. . .  | 392  | Wright, S. v. ....                    | 450  |
| Tucker, Masciulli v. ....           | 200  |                                       |      |
| Tyson v. Ciba-Geigy Corp. ....      | 626  | Yeargin Construction Co.,             |      |
| Vuncannon v. Vuncannon .....        | 255  | Dillingham v. ....                    | 684  |

# CASES REPORTED WITHOUT PUBLISHED OPINION

| PAGE   | PAGE |
|--|------|
| Ange, S. v. . . . .  | 591  |
| Atkins v. Forsyth<br>International, Ltd. . . . .                               | 761  |
| Atlantic Oil Service, Inc.<br>v. Stirewalt . . . . .                           | 761  |
| Battle, S. v. . . . .  | 762  |
| Bell and Lucas, S. v. . . . .  | 591  |
| Berthiez v. Berthiez . . . . .   | 149  |
| Best Health, Inc., Rogers &<br>Hudson Properties v. . . . .                    | 761  |
| Bivens v. Eimco-Elkhorn . . . . .  | 764  |
| Black v. General Cinema Corp. . . . .  | 764  |
| Bonczek, Nautilus Homes, Inc. v. . . . .                                       | 764  |
| Boone, Brown v. . . . .  | 761  |
| Brand-Rex Company, Wooten v. . . . .   | 302  |
| Brannon v. Brannon . . . . .   | 149  |
| Britt v. Carolina Aquatech<br>Pools and Patio Shop, Inc. . . . .               | 761  |
| Brosnan, Williams v. . . . .   | 593  |
| Brown v. Boone . . . . .   | 761  |
| Brown, S. v. . . . .   | 591  |
| Bullock, S. v. . . . .   | 301  |
| Burnette, S. v. . . . .  | 762  |
| Burris, S. v. . . . .  | 762  |
| Carolina Aquatech Pools and<br>Patio Shop, Inc., Britt v. . . . .              | 761  |
| Carolina Medical Products<br>Company v. Southeastern<br>Hospital Corp. . . . . | 149  |
| Century Home Builders,<br>Inc., Douglas v. . . . .                             | 591  |
| Chambers, S. v. . . . .  | 591  |
| Chipman v. Chipman . . . . .   | 761  |
| City of Fayetteville, E & J<br>Investments, Inc. v. . . . .                    | 591  |
| Coley, S. v. . . . .   | 301  |
| Combs, In re Foreclosure of . . . . .  | 149  |
| Connard, S. v. . . . .   | 762  |
| Copeland, S. v. . . . .  | 591  |
| Cross, S. v. . . . .   | 592  |
| D.E.U. Enterprises v.<br>Whiteline, Inc. . . . .                               | 301  |
| Dalton, Department of<br>Transportation v. . . . .                             | 761  |
| Daniel, S. v. . . . .  | 592  |
| Daniels v. N. C. Division of<br>Motor Vehicles . . . . .                       | 591  |
| Daskal, Katsos v. . . . .  | 301  |
| Day, Updike v. . . . .   | 149  |
| Department of Transportation<br>v. Dalton . . . . .                            | 761  |
| Douglas v. Century Home<br>Builders, Inc. . . . .                              | 591  |
| Dravo Corp., Sims v. . . . .   | 764  |
| Duncan v. Duncan . . . . .   | 149  |
| E & J Investments, Inc. v.<br>City of Fayetteville . . . . .                   | 591  |
| Eastern Carolina Warehouse of<br>Goldsboro, Inc. v. Malpass . . . . .          | 301  |
| Edsall, Tandy Computer<br>Leasing, Inc. . . . .                                | 593  |
| Edwards, S. v. . . . .   | 762  |
| Eimco-Elkhorn, Bivens v. . . . .   | 764  |
| Eubanks, S. v. . . . .   | 762  |
| Evans v. Heintz . . . . .  | 761  |
| Fayetteville, City of, E & J<br>Investments, Inc. v. . . . .                   | 591  |
| Fields, S. v. . . . .  | 301  |
| Forsyth International, Ltd.,<br>Atkins v. . . . .                              | 761  |
| Foy, Kinser v. . . . .   | 591  |
| General Cinema Corp., Black v. . . . .   | 764  |
| Gibbs, S. v. . . . .   | 762  |
| Gilliland, S. v. . . . .   | 592  |
| Gitautis, Griswold v. . . . .  | 764  |
| Godwin, S. v. . . . .  | 592  |
| Graham v. Morrison . . . . .   | 761  |
| Gray, S. v. . . . .  | 301  |
| Griswold v. Gitautis . . . . .   | 764  |
| Hamby v. Triplett . . . . .  | 149  |
| Hamilton, S. v. . . . .  | 762  |
| Hancock, Inc. v. Kibler . . . . .  | 301  |
| Hartley, S. v. . . . .   | 302  |
| Harvell, Winfree v. . . . .  | 593  |
| Harvey, S. v. . . . .  | 149  |
| Hayes v. Hayes . . . . .   | 301  |
| Heath, S. v. . . . .   | 302  |
| Heintz, Evans v. . . . .   | 761  |
| Hensley, S. v. . . . .   | 592  |

# CASES REPORTED WITHOUT PUBLISHED OPINION

| PAGE   | PAGE  |
|--|---|
| Hill, S. v. .... 762   | Nautilus Homes, Inc. v. Bonczek ... 764   |
| Hoffman v. N. C. Dept. of<br>Motor Vehicles ..... 761                    | N. C. Dept. of Motor Vehicles,<br>Hoffman v. .... 761                                   |
| Holbert, S. v. .... 762  | N. C. Division of Motor<br>Vehicles, Daniels v. .... 591                                |
| Holbrooks, Joye v. .... 761  | Norman, S. v. .... 763  |
| Hope, S. v. .... 592   | Norman, S. v. .... 763  |
| Hopkins, S. v. .... 762  |   |
| House v. House ..... 764   |   |
|  | Ochran v. Ochran ..... 764  |
| In re Foreclosure of Combs ..... 149                                     | Olmert, Miller v. .... 761  |
| In re Perry ..... 591  | Owensby v. Owensby ..... 301  |
| In re White ..... 761  |   |
| In re Wiggins ..... 301  | Parker v. Lippard ..... 591   |
| Isom, S. v. .... 592   | Parkway Homes Co.,<br>Peterson v. .... 764  |
|  | Perry, In re ..... 591  |
| Jackson, S. v. .... 762  | Pervis, S. v. .... 763  |
| Javier, S. v. .... 149   | Peterson v. Parkway<br>Homes Co. .... 764   |
| Joye v. Holbrooks ..... 761  |   |
|  | Ransom, S. v. .... 302  |
| Katsos v. Daskal ..... 301   | Reed, S. v. .... 149  |
| Kibler, Hancock, Inc. v. .... 301  | Reynolds, S. v. .... 763  |
| Kinser v. Foy ..... 591  | Robbins, Sprinkle v. .... 764   |
|  | Rogers & Hudson Properties v.<br>Best Health, Inc. .... 761                             |
| Laney, S. v. .... 592  | Rogerson, S. v. .... 592  |
| Lawson, S. v. .... 592   |   |
| Ledford, Salts v. .... 761   | Salts v. Ledford ..... 761  |
| Lewis v. Weyerhaeuser<br>Company ..... 301                               | Scales, S. v. .... 302  |
| Lightsey, S. v. .... 592   | Scott, S. v. .... 763   |
| Lindsay Publishing Company,<br>Wood v. .... 763                          | Shannon, S. v. .... 592   |
| Lippard, Parker v. .... 591  | Sharpe, S. v. .... 763  |
| Lucas, Bell and, S. v. .... 591  | Sims v. Dravo Corp. .... 764  |
|  | Smith, S. v. .... 763   |
| McDowell, S. v. .... 592   | Smith, S. v. .... 763   |
| McRae, S. v. .... 762  | Smyre, S. v. .... 763   |
|  | Southeastern Hospital Supply<br>Corp., Carolina Medical<br>Products Company v. .... 149 |
| Malpass, Eastern Carolina<br>Warehouse of<br>Goldsboro, Inc. v. .... 301 | Spaulding and Perkins,<br>Ltd., Spence v. .... 149                                      |
| Manning, S. v. .... 592  | Spence v. Spaulding and<br>Perkins, Ltd. .... 149                                       |
| Martin, S. v. .... 592   | Springs, S. v. .... 593   |
| Millard v. Waters ..... 761  | Sprinkle v. Robbins ..... 764   |
| Miller v. Olmert ..... 761   | S. v. Ange ..... 591  |
| Morris, S. v. .... 762   | S. v. Battle ..... 762  |
| Morrison, Graham v. .... 761   |   |
| Mulgrow, S. v. .... 592  |   |
| Murray, S. v. .... 763   |   |



# CASES REPORTED WITHOUT PUBLISHED OPINION

|                                | PAGE |                                       | PAGE |
|--------------------------------|------|---------------------------------------|------|
| S. v. Bell and Lucas . . . . . | 591  | S. v. Sharpe . . . . .                | 763  |
| S. v. Brown . . . . .          | 591  | S. v. Smith . . . . .                 | 763  |
| S. v. Bullock . . . . .        | 301  | S. v. Smith . . . . .                 | 763  |
| S. v. Burnette . . . . .       | 762  | S. v. Smyre . . . . .                 | 763  |
| S. v. Burris . . . . .         | 762  | S. v. Springs . . . . .               | 593  |
| S. v. Chambers . . . . .       | 591  | S. v. Strong . . . . .                | 302  |
| S. v. Coley . . . . .          | 301  | S. v. Tate . . . . .                  | 593  |
| S. v. Connard . . . . .        | 762  | S. v. Toler . . . . .                 | 763  |
| S. v. Copeland . . . . .       | 591  | S. v. Trueblood . . . . .             | 763  |
| S. v. Cross . . . . .          | 592  | S. v. Walker . . . . .                | 763  |
| S. v. Daniel . . . . .         | 592  | S. v. Wester . . . . .                | 763  |
| S. v. Edwards . . . . .        | 762  | S. v. Wingo . . . . .                 | 763  |
| S. v. Eubanks . . . . .        | 762  | S. v. Worley . . . . .                | 763  |
| S. v. Fields . . . . .         | 301  | Steinbach v. Venters . . . . .        | 149  |
| S. v. Gibbs . . . . .          | 762  | Stirewalt, Atlantic Oil               |      |
| S. v. Gilliland . . . . .      | 592  | Service, Inc. v. . . . .              | 761  |
| S. v. Godwin . . . . .         | 592  | Strong, S. v. . . . .                 | 302  |
| S. v. Gray . . . . .           | 301  |                                       |      |
| S. v. Hamilton . . . . .       | 762  | Tandy Computer Leasing,               |      |
| S. v. Hartley . . . . .        | 302  | Inc. v. Edsall . . . . .              | 593  |
| S. v. Harvey . . . . .         | 149  | Tate, S. v. . . . .                   | 593  |
| S. v. Heath . . . . .          | 302  | Toler, S. v. . . . .                  | 763  |
| S. v. Hensley . . . . .        | 592  | Triplett, Hamby v. . . . .            | 149  |
| S. v. Hill . . . . .           | 762  | Trueblood, S. v. . . . .              | 763  |
| S. v. Holbert . . . . .        | 762  |                                       |      |
| S. v. Hope . . . . .           | 592  | Urdike v. Day . . . . .               | 149  |
| S. v. Hopkins . . . . .        | 762  | Urban, Watkins v. . . . .             | 302  |
| S. v. Isom . . . . .           | 592  |                                       |      |
| S. v. Jackson . . . . .        | 762  | Venters, Steinbach v. . . . .         | 149  |
| S. v. Javier . . . . .         | 149  |                                       |      |
| S. v. Laney . . . . .          | 592  | Walker, S. v. . . . .                 | 763  |
| S. v. Lawson . . . . .         | 592  | Waters, Millard v. . . . .            | 761  |
| S. v. Lightsey . . . . .       | 592  | Watkins v. Urban . . . . .            | 302  |
| S. v. McRae . . . . .          | 762  | Wester, S. v. . . . .                 | 763  |
| S. v. McDowell . . . . .       | 592  | Weyerhaeuser Company,                 |      |
| S. v. Manning . . . . .        | 592  | Lewis v. . . . .                      | 301  |
| S. v. Martin . . . . .         | 592  | White, In re . . . . .                | 761  |
| S. v. Morris . . . . .         | 762  | Whiteline, Inc., D.E.U.               |      |
| S. v. Mulgrow . . . . .        | 592  | Enterprises v. . . . .                | 301  |
| S. v. Murray . . . . .         | 763  | Wieland v. Woolard . . . . .          | 302  |
| S. v. Norman . . . . .         | 763  | Wiggins, In re . . . . .              | 301  |
| S. v. Norman . . . . .         | 763  | Williams v. Brosnan . . . . .         | 593  |
| S. v. Pervis . . . . .         | 763  | Williamson v. Williamson . . . . .    | 302  |
| S. v. Ransom . . . . .         | 302  | Winfree v. Harvell . . . . .          | 593  |
| S. v. Reed . . . . .           | 149  | Wingo, S. v. . . . .                  | 763  |
| S. v. Reynolds . . . . .       | 763  | Wood v. Lindsay                       |      |
| S. v. Rogerson . . . . .       | 592  | Publishing Company . . . . .          | 763  |
| S. v. Scales . . . . .         | 302  | Woolard, Wieland v. . . . .           | 302  |
| S. v. Scott . . . . .          | 763  | Wooten v. Brand-Rex Company . . . . . | 302  |
| S. v. Shannon . . . . .        | 592  | Worley, S. v. . . . .                 | 763  |

## GENERAL STATUTES CITED AND CONSTRUED

---

|                  |   |
|------------------|---|
| G.S.             |   |
| 1-40             | Williams v. South & South Rentals, 378                          |
| 1-47             | Adkins v. Adkins, 289   |
| 1-52(3)          | Williams v. South & South Rentals, 378                          |
| 1-54.1           | In re Appeal of CAMA Permit, 32                                 |
| 1-56             | Brisson v. Williams, 53   |
| 1-75.4(5)(e)     | Collector Cars of Nags Head, Inc.<br>v. G.C.S. Electronics, 579 |
| 1A-1             | See Rules of Civil Procedure <i>infra</i>                       |
| 7A-289.24(3)     | In re Manus, 340  |
| 7A-289.25(2)     | In re Manus, 340  |
| 7A-289.32        | In re Manus, 340  |
| 7A-289.32(4)     | In re Manus, 340  |
| 7A-450(b)        | State v. Newton, 555  |
| 7A-454           | State v. Newton, 555  |
| 7A-517(21)       | In re Manus, 340<br><br>In re Stewart Children, 651             |
| 8C-1             | See Rules of Evidence <i>infra</i>                              |
| 14-7.6           | State v. Thomas, 682  |
| 14-27.1(3)       | State v. Moorman, 594   |
| 14-27.3          | State v. Moorman, 594   |
| 14-27.5(a)(1)    | State v. Moorman, 594   |
| 14-71.1          | State v. Alston, 372  |
| 14-72            | State v. Hurst, 1   |
| 14-87            | State v. Hurst, 1<br><br>State v. Myers, 299                    |
| 14-309.8         | Durham Highway Fire Protective Assoc. v. Baker, 583             |
| 15A-245(a)       | State v. Teasley, 150   |
| 15A-1061         | State v. Hurst, 1   |
| 15A-1222         | State v. Moorman, 594   |
| 15A-1242         | State v. Warren, 84   |
| 15A-1334         | State v. Newton, 555  |
| 15A-1340.4(a)(1) | State v. Newton, 555  |

## GENERAL STATUTES CITED AND CONSTRUED

---

G.S.

|                         |   |
|-------------------------|---|
| 15A-1340.4(a)(1)(m)     | State v. Newton, 555  |
| 15A-1340.4(b)           | State v. Hurst, 1   |
| 15A-1340.4(e)           | State v. Morgan, 674  |
| 15A-1345(e)             | State v. Warren, 84   |
| 15A-1354(a)             | State v. Warren, 84   |
| 15A-1415                | State v. Newell, 707  |
| 15A-1443                | State v. Harper, 398  |
| 20-139.1(b3)(3)         | State v. Harper, 398  |
| 20-347                  | McCracken v. Anderson Chevrolet-Olds, Inc., 521                   |
| 20-348                  | McCracken v. Anderson Chevrolet-Olds, Inc., 521                   |
| 24(a)(2)                | State ex rel. Crews v. Parker, 419                                |
| 24-5                    | McNabb v. Town of Bryson City, 385                                |
|                         | Wagner v. Barbee and Seiler v. Barbee, 640                        |
| 25-1-101 <i>et seq.</i> | Wohlfahrt v. Schneider, 69  |
| 25-1-201(10)            | Tyson v. Ciba-Geigy Corp., 626                                    |
| 25-1-201(36)            | Gunby v. Pilot Freight Carriers, Inc., 427                        |
| 25-2-313(1)(a)          | Tyson v. Ciba-Geigy Corp., 626                                    |
| 25-2-316(2)             | Tyson v. Ciba-Geigy Corp., 626                                    |
| 28A-15-2(b)             | Swindell v. Lewis, 423  |
| 39-13.1                 | West v. Hays, 574   |
| 39-13.1(a)              | West v. Hays, 574   |
| 39-13.1(b)              | West v. Hays, 574   |
| 40A-3(b)(3)             | City of Charlotte v. Rousso, 588                                  |
| 44A-18                  | Queensboro Steel Corp. v.<br>East Coast Machine & Iron Works, 182 |
| 47-20                   | Schiller v. Scott, 90   |
| Chpt. 47A               | Laurel Park Villas Homeowners Assoc. v. Hodges, 141               |
| 47A-10                  | Laurel Park Villas Homeowners Assoc. v. Hodges, 141               |
| 48-9                    | In re Baby Boy Shamp, 606   |
| 50-20(b)(3)             | Seifert v. Seifert, 329   |
| 50-20(c)(12)            | Peak v. Peak, 700   |
| 50-20(k)                | Seifert v. Seifert, 329   |

## GENERAL STATUTES CITED AND CONSTRUED

---

G.S.

|                      |   |
|----------------------|---|
| 50-21(b)             | Seifert v. Seifert, 329   |
| 52-8                 | West v. Hays, 574   |
| 55-55(d)             | Lowder v. All Star Mills, Inc., 470   |
| 55-145(a)(1)         | Collector Cars of Nags Head, Inc.<br>v. G.C.S. Electronics, 579                             |
| 59-45                | Stevens v. Nimocks, 350   |
| 74C-1 <i>et seq.</i> | Shipman v. N. C. Private Protective Services Bd., 441                                       |
| 74C-3(b)             | Shipman v. N. C. Private Protective Services Bd., 441                                       |
| 75-1.1               | Moore v. N. C. Farm Bureau Mut. Ins. Co., 616<br>Spence v. Spaulding and Perkins, Ltd., 665 |
| 84-28(b), (c)        | N. C. State Bar v. Whitted, 531   |
| 90-95(h)(5)          | State v. Teasley, 150   |
| 90-112(a)(2)         | State v. Teasley, 150   |
| 90A-51(4)            | King v. N. C. State Bd. of Sanitarian Examiners, 409  |
| 90A-61(a)            | King v. N. C. State Bd. of Sanitarian Examiners, 409  |
| 96-14(1)             | In re Poteat v. Employment Security Comm., 138  |
| 97-31(24)            | Stanley v. Gore Brothers, 411   |
| 97-42                | Foster v. Western Electric Co., 656   |
| 97-47                | Cook v. Southern Bonded, Inc., 277  |
| 97-57                | Long v. N. C. Finishing Co., 568  |
| 97-58(a)             | Long v. N. C. Finishing Co., 568  |
| 97-58(c)             | Knight v. Cannon Mills Co., 453   |
| 97-90                | Knight v. Cannon Mills Co., 453   |
| 97-92                | Knight v. Cannon Mills Co., 453   |
| 105-212              | NCNB v. Powers, 540   |
| 105-342(c)           | In re Appeal of Duke Power Co., 492   |
| 108-51               | Thorne v. N. C. Dept. of Human Resources, 548   |
| 110-137              | State ex rel. Crews v. Parker, 419  |
| 113A-102             | In re Appeal of CAMA Permit, 32   |
| 136-112(1)           | Dept. of Trans. v. Byrum, 96  |
| 143-32               | Flaherty v. Hunt, 112   |
| 143-291              | Hochheiser v. N. C. Dept. of Transportation, 712  |

## GENERAL STATUTES CITED AND CONSTRUED

---

G.S.

|               |  |
|---------------|--|
| 148-18.1      | In re Petition of Kermit Smith, 107                  |
| 150A-51(4)    | King v. N. C. State Bd. of Sanitarian Examiners, 409 |
| 160A, Art. 19 | In re Appeal of CAMA Permit, 32                      |
| 160A-364.1    | In re Appeal of CAMA Permit, 32                      |
| 160A-385      | In re Appeal of CAMA Permit, 32                      |

## RULES OF EVIDENCE CITED AND CONSTRUED

---

Rule No.

|           |   |
|-----------|---|
| 104(a)    | In re Will of Leonard, 646                                  |
| 402       | Wagner v. Barbee and Seiler v. Barbee, 640                  |
| 601(b)(1) | In re Will of Leonard, 646                                  |
| 601(c)    | Peterson v. Finger, 743                                     |
| 702       | State v. Holloway, 586                                      |
| 801       | Southern Watch Supply Co. v.<br>Regal Chrysler-Plymouth, 21 |
| 803(2)    | Southern Watch Supply Co. v.<br>Regal Chrysler-Plymouth, 21 |

## RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

---

### Rule No.

|          |   |
|----------|---|
| 4        | In re Baby Boy Shamp, 606   |
| 4(j)(7)b | Stevens v. Nimocks, 350   |
| 12(b)(6) | In re Baby Boy Shamp, 606   |
| 13(a)    | Brooks v. Rogers, 502   |
| 15(a)    | Tyson v. Ciba-Geigy Corp., 626  |
| 15(b)    | Howell v. Waters, 481<br>Tyson v. Ciba-Geigy Corp., 626<br>Wohlfahrt v. Schneider, 69 |
| 15(c)    | Stevens v. Nimocks, 350   |
| 17(a)    | In re Manus, 340  |
| 24       | In re Baby Boy Shamp, 606   |
| 24(a)(2) | State ex rel. Crews v. Parker, 419  |
| 41(a)(2) | Smith v. Williams, 672  |
| 41(b)    | Estee Co. v. Goodman, 692   |
| 50(a)    | Rice v. Wood, 318   |
| 52(a)(1) | Wohlfahrt v. Schneider, 69  |
| 60(b)(1) | East Carolina Oil Transport v.<br>Petroleum Fuel & Terminal Co., 746                  |

**CONSTITUTION OF UNITED STATES  
CITED AND CONSTRUED**

---

|               |                                     |
|---------------|-------------------------------------|
| Amendment IV  | State v. Alston, 372                |
| Amendment V   | State v. Hurst, 1                   |
|               | State v. Roberts, 733               |
| Amendment VI  | State v. Moorman, 594               |
| Amendment XIV | In re Petition of Kermit Smith, 107 |
|               | State v. Hurst, 1                   |

**CONSTITUTION OF NORTH CAROLINA  
CITED AND CONSTRUED**

---

|              |   |
|--------------|---|
| Art. I, § 19 | In re Petition of Kermit Smith, 107                   |
|              | Shipman v. N. C. Private Protective Services Bd., 441 |
|              | State v. Hurst, 1                                     |
|              | State v. Moorman, 594                                 |
| Art. I, § 23 | State v. Moorman, 594                                 |

**RULES OF APPELLATE PROCEDURE  
CITED AND CONSTRUED**

---

|          |                     |
|----------|---------------------|
| Rule No. |                     |
| 10(b)(2) | State v. White, 358 |





CASES  
ARGUED AND DETERMINED IN THE  
**COURT OF APPEALS**  
OF  
**NORTH CAROLINA**  
AT  
**RALEIGH**

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STATE OF NORTH CAROLINA v. CHARLES ALFRED HURST

No. 8512SC854

(Filed 15 July 1986)

**1. Constitutional Law § 46— appointed counsel—motions to replace—denied without hearing—no error**

The trial court did not err in a prosecution for armed robbery and felonious larceny by considering the indigent defendant's request for another counsel without a formal hearing where defendant raised no issue of conflict of interest or irreconcilable conflict; noted no instances of incompetency, lack of diligence, or questionable judgment; and apparently felt that his appointed counsel was "trying his best."

**2. Criminal Law § 70— tape recorded conversation—admission not prejudicial error**

There was no prejudicial error in a prosecution for armed robbery and larceny in the admission of a taped conversation and a transcript of that conversation without proper authentication or in the denial of defendant's motion for a mistrial based on the admission of that evidence where the tape and transcript were cumulative and there was overwhelming evidence that defendant had committed the crime as charged. N.C.G.S. § 15A-1061 (1983).

**3. Criminal Law § 6— voluntary intoxication—refusal to instruct—no error**

The trial court did not err in a prosecution for armed robbery and larceny by refusing to instruct the jury on voluntary intoxication where the only evidence supporting defendant's claim of intoxication was his own testimony that he and his friends "got high" about 7:00 a.m. on 6 August 1984; defendant claimed that he had had about two or three joints of marijuana and a "couple of nods" of cocaine and did not remember events of the latter part of the day until he woke up driving the victim's car at 8:00 p.m.; defendant claimed the events he recounted to officers in two separate interviews were suggested to him by friends and officers; there was no evidence regarding the effect the

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**State v. Hurst**

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drugs had on defendant's ability to reason at the time of the crime; and the crime was committed nearly nine hours after defendant got high.

**4. Criminal Law § 102.6— armed robbery—prosecutor's argument for conviction to prevent future murder by defendant—no prejudice**

The trial court did not commit reversible error in a prosecution for armed robbery and larceny by failing to strike a prosecutor's argument that was susceptible to the interpretation that the jury should convict defendant to keep him from returning to commit murder where the remark was not so grossly improper that it was likely to influence the verdict.

**5. Constitutional Law § 34— armed robbery and felonious larceny—taking of car and items in trunk—double jeopardy**

A single series of acts may not support convictions for armed robbery and felonious larceny when there has been only one taking from one victim at one time; defendant's act of taking control of a car and driving the car away from the victim constituted the single act of taking the car and the items within the car. N.C.G.S. § 14-72, N.C.G.S. § 14-87. North Carolina Constitution Art. I, § 19, U.S. Constitution Amendments V and XIV.

**6. Criminal Law § 138.14— consolidated sentencing—one judgment arrested—re-manded**

A case was remanded for resentencing where convictions for armed robbery and felonious larceny were consolidated for judgment and sentencing; judgment was arrested on the armed robbery conviction; defendant's twenty-year sentence exceeded the total of the presumptive terms; the court did not indicate whether the additional years were added for the armed robbery or the felonious larceny or both; and one of the aggravating factors could apply to either one or both convictions. N.C.G.S. § 15A-1340.4(b).

APPEAL by defendant from *Farmer, Judge*. Judgment entered 9 May 1985 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 12 December 1985.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Newton G. Pritchett, Jr., for the State.*

*James R. Parish for defendant appellant.*

BECTON, Judge.

From judgments imposing prison sentences totaling twenty years following his conviction of robbery with a dangerous weapon and felonious larceny, defendant, Charles Alfred Hurst, appeals.

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State v. Hurst

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## I

On 6 October 1984, Ms. Shields, who was shopping in Fayetteville, North Carolina, returned to her car and locked two grocery bags and her pocketbook, containing personal property valued at more than \$400.00, in the trunk. She then unlocked the driver's door to enter the car, but she felt someone behind her. A young man told her to move over. She screamed, and the man pointed a gun at her and threatened to shoot if she screamed again. She asked the man to let her go, and another man standing in front of the car said, "Let her go." She slid out of the car, with the car keys in her hand, screamed and fled, but the man with the gun took the keys from her hand before she got away. He then drove the car away.

The next day, Ms. Shields' abandoned car was discovered by the police. In the glove compartment, there was a wallet containing a high school identification card with the defendant's name and picture on it. On 8 October 1984, defendant was positively identified by Ms. Shields in a photographic line-up.

Two members of the Fayetteville Police Department went to defendant's high school and picked him up. They took defendant to the Law Enforcement Center, arrested him, and read him his *Miranda* rights. Defendant waived his right to remain silent and described to the officers the events of 6 October 1984 substantially in accordance with Ms. Shields' account. He named his two accomplices and said that he went riding around town. He also said that he had thrown Ms. Shields' pocketbook into a trash can at his school. Defendant took the officers to the trash can, but the contents had been emptied into a dumpster. Defendant helped to search the dumpster; they found only a check and some other papers belonging to Ms. Shields. After broadcasting over the high school's public announcement system a request for assistance in retrieving the pocketbook, the officers were contacted by a student who took them to her home where she had Ms. Shields' pocketbook. Along the way, defendant directed the officers to a friend's apartment where he retrieved Ms. Shields' car keys.

The officers took defendant back to the Law Enforcement Center, read him his rights again, and obtained another waiver. The defendant then gave a recorded account of the incidents of 6

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**State v. Hurst**

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October 1984. One of the officers later recovered the pistol used by defendant.

At trial, defendant's recorded statement was played, over objection, for the jury. The defendant testified that he was high on marijuana on the morning of 6 October 1984 and that he did not remember what happened that day until he "woke up" driving the car. He testified that his account of the day's events was a result of what the officers and his friends had told him.

The jury returned a verdict of guilty on both the robbery with a firearm and the felonious larceny counts. After a sentencing hearing at which the court found aggravating and mitigating factors, the court imposed a sentence greater than the presumptive term for the offenses.

## II

Defendant presents ten arguments on appeal. In brief, he asserts that the trial court erred in (1) failing to conduct a full hearing upon defendant's request for the appointment of new trial counsel; (2) admitting a tape recording and transcript without proper authentication; (3) failing to grant a mistrial; (4) failing to dismiss the felonious larceny charge at the close of the evidence; (5) failing to instruct the jury on the defense of voluntary intoxication; (6) failing to strike portions of the prosecutor's closing arguments; (7) finding as an aggravating factor that defendant induced others to participate in the crime; (8) failing to find as a mitigating factor that defendant aided in the apprehension of another felon; and (9) failing to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing at an early stage in the criminal process. Defendant's final argument is that this Court should arrest judgment on the felonious larceny conviction because he cannot be punished for both felonious larceny and armed robbery on the facts of this case. We agree with defendant on his final argument. Therefore, judgment on the felonious larceny conviction is arrested. Because (a) the two convictions were consolidated for judgment and sentencing, (b) a sentence greater than the presumptive term was imposed, and (c) the sentencing court did not indicate to which offense the additional years were added, the case is remanded for resentencing.

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State v. Hurst

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## III

[1] Defendant argues that when he moved the court to appoint substitute counsel, the court should have conducted a full hearing to determine whether substitution of counsel was appropriate. Defendant twice requested substitute counsel, the first time as follows:

THE DEFENDANT: Your Honor, I would like to make a motion, please, that I would like to have another attorney assigned to me because I don't believe this attorney right here is acting—I don't believe he is protecting me—I mean, defendant me in my best interest and everything. He shows no respect to my family. When he talks to me, he [is] always looking at me like I'm crazy. I do not wish to have this attorney and I wish the State to please give me another attorney.

COURT: Is there anything else you would like to say to the Court before I call the jury back in?

THE DEFENDANT: No, sir.

COURT: All right. Motion denied.

Some time later in the trial, defendant again requested new counsel:

THE DEFENDANT: Your Honor, I would like to say something. I know Mr. Britt, he is trying his best and everything. But I still wish that I could get another attorney because that tape right there, I don't believe it should have been admissible evidence because I done and talked to other lawyers and they said it shouldn't be admissible evidence because I was interrogated. I don't see why you keep—every time this man say something, you keep denying everything and saying sustained. The man ain't going to get to do his job. . . .

An indigent defendant's right to competent counsel at trial does not encompass the right to choose a specific attorney. *State v. Thacker*, 301 N.C. 348, 271 S.E. 2d 252 (1980). Mere dissatisfaction with appointed counsel's services is insufficient to trigger the right to substitute counsel. *State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976); *State v. Robinson*, 290 N.C. 56, 224 S.E. 2d 174

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State v. Hurst

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(1976). In order to invoke this right, "defendant must show good cause, such as a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict which leads to an apparently unjust verdict." *Sweezy*, 291 N.C. at 372, 230 S.E. 2d at 528-29 (citations omitted) (quoting *United States v. Young*, 482 F. 2d 993 (5th Cir. 1973)). Defendant's right is based on the Sixth Amendment guaranty of effective assistance of counsel, but the defendant must raise an apparently substantial complaint regarding the representation provided. The trial court is required to assure that original counsel is reasonably competent and able to render effective assistance. *Thacker*, 301 N.C. at 352, 271 S.E. 2d at 255.

Although generally it is better practice to inquire into defendant's objections the first time defendant raises serious and substantial complaints, the trial court is not required to conduct a detailed hearing to resolve the issue. *Thacker*; *Sweezy*. In the case at bar, defendant raised no issue of conflict of interest or irreconcilable conflict. He noted no instances of incompetency, lack of diligence, or even questionable judgment. See *State v. Poole*, 305 N.C. 308, 289 S.E. 2d 335 (1982) (defendant raised issue of counsel's competence). It appears from defendant's second motion that he believed appointed counsel was "trying his best." Defendant was understandably dismayed at the introduction of the taped statement, but, as the trial court explained, the defense attorney was doing all that he could for defendant.

Each case in which effective assistance of counsel is questioned must be examined individually, and the decision to appoint substitute counsel is committed to the sound discretion of the trial court. *State v. Hutchins*, 303 N.C. 321, 336, 279 S.E. 2d 788, 798 (1981); *State v. Bowen*, 56 N.C. App. 210, 287 S.E. 2d 458, *disc. rev. denied and appeal dismissed*, 305 N.C. 588, 292 S.E. 2d 7 (1982). We hold that it was not error for the trial court in the case at bar to consider defendant's request without a formal hearing. *Thacker*; *Bowen*. No abuse of discretion or ineffective assistance of counsel has been shown.

#### IV

[2] Defendant's second and third arguments, which he presents together, are that the trial court erred in admitting into evidence a taped conversation and a transcript of the conversation without

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State v. Hurst

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proper authentication and that, therefore, the trial court erred in failing to grant defendant's motion for a mistrial based on the admission of that evidence.

Even assuming the State failed to establish that the defendant's entire statement was recorded and that no unexplained changes, additions or deletions had been made—as is required under *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971)—and even though no witness for the State testified that the recorded statement was accurate or complete, the defendant has failed to demonstrate the prejudicial effect of the admission of the challenged evidence. There was overwhelming evidence that the defendant committed the crime as charged. For example, one officer's testimony recounted defendant's previous in-custody interview in which defendant described how he and his friends committed the alleged crime. The victim positively identified the defendant as her assailant. The defendant's wallet was found in the victim's abandoned car one day after the crime, and defendant took the police officers to the stolen pocketbook and keys. There was no alibi defense in this case as there was in *State v. Toomer*, 311 N.C. 183, 316 S.E. 2d 66 (1984). And there were no long, suspicious "gaps" or inaudible portions of the tape as there were in *State v. Shook*, 55 N.C. App. 364, 285 S.E. 2d 328 (1982).

The taped statement and the transcript were cumulative. We cannot say there is a reasonable possibility that had they been excluded, the jury would have reached a different conclusion. *Toomer*.

For similar reasons, the trial court did not err in denying defendant's motion for a mistrial. He has failed to show that the admission of this evidence resulted in "substantial and irreparable prejudice" to his defense or made it impossible for the jury to render an impartial verdict. N.C. Gen. Stat. Sec. 15A-1061 (1983); see *State v. Blackstock*, 314 N.C. 232, 333 S.E. 2d 245 (1985).

## V

Defendant next contends that the trial court erroneously failed to dismiss the charge of felonious larceny at the close of all the evidence. In light of our decision in Part IX, *infra*, it is not necessary to address this issue.

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State v. Hurst

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## VI

[3] Defendant argues that the court erred in refusing to instruct the jury on the defense of voluntary intoxication. The trial court is required to instruct the jury on voluntary intoxication only if the defendant presents evidence that he or she was "so completely intoxicated as to be utterly unable to form the specific intent necessary at the time the crime was committed." *State v. Williams*, 308 N.C. 47, 71, 301 S.E. 2d 335, 350 (citations omitted), *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, 104 S.Ct. 202 (1983). In the case at bar, the specific intent essential to convict of robbery is the intent to permanently deprive the owner of his or her goods and appropriate them to the taker's use. *State v. Norris*, 264 N.C. 470, 141 S.E. 2d 869 (1965).

The only evidence supporting defendant's claim of intoxication was his own testimony that he and his friends "got high" at about seven o'clock on the morning of 6 October 1984. According to defendant, he had "about two or three joints" of marijuana and "a couple of nods" of cocaine. He claimed that he did not remember the events of the latter part of the day until he "woke up" as he was driving Ms. Shields' car at eight o'clock that evening. He testified that the events he recounted to the officers during the two separate interviews were suggested to him by friends and by the officers.

This evidence is insufficient to require an instruction on voluntary intoxication. The crime was committed nearly nine hours after defendant "got high"—according to Ms. Shields, the incident occurred in the late afternoon, at about four o'clock. Moreover, there was no evidence regarding the effect the drugs had on defendant's ability to reason at the time of the crime. *See State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976). He testified only to a subsequent loss of memory. There was, in short, no evidence that he was so intoxicated that he could not form the specific intent necessary at the time the crime was committed.

## VII

[4] Defendant next argues that the trial court committed reversible error in failing to strike the following italicized portions of the district attorney's closing argument:



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State v. Hurst

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If you were me, what else would you say to you? He did it. I proved it. You go out there, talk about it and come back in here and find him guilty, regardless of the fact that he is seventeen, regardless of the fact that Mr. Britt says he's going to serve at least fourteen years in prison.

You promised me, each of you, that you would follow the law as the Judge gives it to you.

*You saw his attitude, his demeanor. You let him go, and he'll be right back, hopefully, only on an armed robbery charge —*

MR. BRITT: Objection.

MR. AMMONS: *Hopefully, on an armed robbery charge and not a murder charge.*

MR. BRITT: Objection. Move that all that be stricken and ordered disregarded.

COURT: Overruled.

MR. AMMONS: Mrs. Shields was just a slight pressure on his index finger from being shot.

All I'm asking you to do is what you told me you would do. Do your job. If you're convinced, and I contend you should be, go out there, talk about it and come back in here and say, Mr. Hurst, based on this evidence, overwhelming evidence, we find you guilty as charged.

Generally, wide latitude is allowed counsel during closing argument to the jury, and control of the scope of a prosecutor's remarks is left in the discretion of the trial court. We will not review the court's determination absent "such gross impropriety in the argument as would be likely to influence the verdict of the jury." *State v. Covington*, 290 N.C. 313, 328, 226 S.E. 2d 629, 640 (1976) (citations omitted). Nonetheless, the prosecutor may not place before the jury "incompetent and prejudicial matter" or arguments not supported by the evidence. *Id.*

It is improper for a prosecutor to attempt to induce a jury to convict a defendant in order to prevent him from committing murder in the future. In the case at bar, the State argues that the prosecutor simply made the permissible argument that armed

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*State v. Hurst*

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robbery is a crime next in severity only to murder. *See State v. Brown*, 39 N.C. App. 548, 251 S.E. 2d 706, *cert. denied*, 297 N.C. 302, 254 S.E. 2d 923 (1979). The remark objected to by defendant is susceptible to the interpretation that the jury should convict defendant to prevent him from returning to commit murder. Thus, it is improper. Nevertheless, we hold that on the evidence presented in this case the prosecutor's improper remark was not reversibly prejudicial to defendant. *See Covington*. Even though the trial court did not instruct the jury to disregard the improper remark, it was not so grossly improper that it was "likely to influence the verdict." We do not condone the practice of extending closing remarks beyond fair bounds, but the prosecutor's improper remark was harmless in this case. *See State v. Miller*, 288 N.C. 582, 601, 220 S.E. 2d 326, 338-39 (1975).

## VIII

Defendant's next three arguments relate to the sentencing phase of the trial. He asserts that errors in finding an aggravating factor and in failing to find certain mitigating factors entitle him to a new sentencing hearing under *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). After careful consideration of the facts in this case, the relevant law, and defendant's arguments, we conclude that the trial court did not err in sentencing defendant.

## IX

[5] Defendant's final argument is that this Court should arrest judgment on the felonious larceny conviction because, under the facts of this case, felonious larceny merges with the greater felony of armed robbery. Although we do not hold that felonious larceny of goods worth over \$400 merges into the offense of armed robbery, we agree with defendant that judgment on the felonious larceny conviction must be arrested. The basis on our decision is that defendant's right to be free from double jeopardy under Article I, Section 19 of the North Carolina Constitution and Amendments V and XIV to the United States Constitution was violated by his punishment under two statutes which the legislature intended to be mutually exclusive under facts such as those in the case at bar.

The issue before us is whether a single series of acts may support convictions under both N.C. Gen. Stat. Secs. 14-87 (armed

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State v. Hurst

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robbery) and 14-72 (felonious larceny) (1981) when there has been only one taking from one victim at one time. We hold that it cannot.

The fundamental constitutional prohibition against placing a person twice in jeopardy for the same criminal offense is "deeply imbedded in our jurisprudence." *State v. Hill*, 287 N.C. 207, 214, 214 S.E. 2d 67, 72 (1975) (citations omitted). "The Double Jeopardy Clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *State v. Gardner*, 315 N.C. 444, 340 S.E. 2d 701 (1986) (citations omitted); *Hill*.

In the instant case, we are concerned with the third category. Recognizing the distinction noted in *Gardner* between single-prosecution and successive prosecution situations, we proceed to analyze this case under the single-prosecution standards as set forth in *Gardner*:

Where multiple punishment is involved, the Double Jeopardy Clause acts as a restraint on the prosecutor and the courts, not the legislature. *Brown v. Ohio*, 432 U.S. 161, 53 L.Ed. 2d 187 (1977). The Double Jeopardy Clauses of both the United States and North Carolina Constitutions prohibit a court from imposing more punishment than that intended by the legislature. "[T]he question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." *Whalen v. United States*, 445 U.S. 684, 688, 63 L.Ed. 2d 715, 721 (1980).

315 N.C. at 452-53, 340 S.E. 2d at 707-08; *Missouri v. Hunter*, 459 U.S. 359, 74 L.Ed. 2d 535, 103 S.Ct. 673 (1983); *Albernaz v. United States*, 450 U.S. 333, 67 L.Ed. 2d 275, 101 S.Ct. 1137 (1981). "The Double Jeopardy Clause plays only a limited role in deciding whether cumulative punishments may be imposed under different statutes at a single criminal proceeding—that role being only to prevent the sentencing court from prescribing greater punishments than the legislature intended." *Gardner*, 315 N.C. at 460, 340 S.E. 2d at 712. Thus, we must determine whether the legislature intended to allow multiple punishment in situations such as

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State v. Hurst

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the one at bar. If it did not, then the imposition of multiple punishment by the trial court was erroneous.

A

We consider first whether there were one or two criminal "takings." Defendant was charged in a single indictment with two offenses.

In the first paragraph of the indictment he was charged with armed robbery of the victim's purse and its contents (including \$350 in cash), a raincoat, a pair of shoes, a brass belt buckle, pantyhose, credit card receipts, an umbrella, a shoe bag and its contents, "an assortment of food items," and four car keys—all valued at \$1,057.25. In the second paragraph he was charged with felonious larceny of the car.

It is undisputed that defendant held a gun to the victim's head and that the victim ran away from the car. The items set forth in the first paragraph of the indictment apparently were in the trunk of the car.<sup>1</sup> We believe that defendant's act of taking control of the car and driving the car away from the victim constituted a single act of taking the car and the items within the car. This was not one "series of events" or one "course of conduct." Rather, it was a single act whereby defendant took a car and its contents. Although a course of conduct may be divided into units of activity—a robbery, a burglary, a larceny—in this case, the act of taking the car cannot be separated from the act of taking the items in the trunk.

Departmentalizing criminal conduct into component parts yielding plural liability is the greatest threat in attempting to avoid multiple punishment, and it is therefore pertinent and indispensable first to determine whether or not one or more punishable transactions legally occurred in the course of a defendant's criminal conduct.

Comment, *Criminal Law—Multiple Punishment and the Same Evidence Rule*, 8 Wake Forest L. Rev. 243, 243 (1972).

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1. Defendant was not charged with robbery of the victim's keys from her hand as an act separate from the taking of the other items. Some keys are listed in the indictment along with all the items from the trunk. We express no opinion on whether the taking of the keys may be viewed as separate from the taking of the car.

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State v. Hurst

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Instructive in this regard is *State v. Fambrough*, 28 N.C. App. 214, 220 S.E. 2d 370 (1975). The defendant and another man entered a motel. The defendant held a knife to an employee's throat, and he took \$79 along with a pistol from the victim. Defendant was charged in one indictment with armed robbery of money, and in the other he was charged with armed robbery of a pistol. He was convicted of both. This Court said:

[W]e find that only one robbery occurred, in which two kinds of property were taken, money and a pistol. The two indictments charged separate offenses. Clearly both indictments and the evidence relate to what occurred on the same occasion. The same evidence would support a conviction on each charge. Under the "same evidence test," this amounts to double jeopardy. *State v. Ballard*, 280 N.C. 479, 186 S.E. 2d 372 (1972).

*Id.* at 214-15, 220 S.E. 2d at 371.

Thus, when several items are taken from one person at the same time, there is only one criminal taking. And, absent specific statutory authorization to the contrary, the prosecutor may not divide property taken at one time from one victim in one place into separate items or units for purposes of prosecuting defendant for separate takings. *State v. Boykin*, 78 N.C. App. 572, 337 S.E. 2d 678 (1985) (When the legislature made larceny of a firearm a felony, it did not intend to allow separate punishments—or "units of prosecution"—for each firearm taken when several firearms were taken at once from the same place.). Thus, if defendant's punishments for both felonious larceny and armed robbery are to be upheld, it must be because the legislature intended to allow punishment under both G.S. Secs. 14-72 and -87 for a single taking.

## B

In *State v. Gardner*, the Supreme Court considered whether the legislature intended to allow multiple punishment for (1) breaking or entering and (2) felonious larceny pursuant to a breaking and entering. The Court examined several factors to determine legislative intent. The Court explained that, in a *single* prosecution analysis, a conclusion that two offenses "merge" or satisfy the "lesser-included-offense" standard is simply one of the

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State v. Hurst

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several tools to assist in determining legislative intent. 315 N.C. at 454-55, 340 S.E. 2d at 708-09. We now apply the factors from *Gardner* to assess legislative intent regarding the offenses involved in the case at bar.

First, the *Gardner* Court noted that the two offenses violated "two separate and distinct social norms, the breaking into or entering the property of another, and the stealing and carrying away of another's property." 315 N.C. at 461, 340 S.E. 2d at 712. This stands in contrast to the offenses in the case at bar. Armed robbery and larceny both involve the violation of the same social norm: stealing and carrying away the property of another. And the taking of property worth over \$400 does not implicate a separate and distinct social norm—it simply involves a more egregious violation of the same norm. Of course, armed robbery involves the violation of an additional norm: the use or threatened use of a weapon on another person. But to punish for armed robbery *ipso facto* punishes for violating the social norm against stealing and carrying away another's property.

The *Gardner* Court also analyzed the legislative histories of breaking and entering and larceny. There is no need to recount the histories of the offenses involved in the case *sub judice*, as they are found in other cases. *See, e.g., Gardner* (larceny); *State v. Chase*, 231 N.C. 589, 58 S.E. 2d 364 (1950) (armed robbery). It is sufficient for our purposes to note that when the legislature enacted G.S. Secs. 14-72 and -87, it did not intend to change the common law offenses of larceny and robbery. It simply intended to codify the common law and to provide for more severe punishment under certain circumstances. *See Chase*. As explained below, under the common law (at least until 1980) larceny was a lesser included offense of robbery. That is, a defendant could be punished for only one of these offenses if he or she committed only a single criminal act. When the legislature altered the punishment for these offenses in specific situations, it did not intend to change the well-established prohibition against punishment for both larceny and armed robbery of the same property from a single victim. *Cf. Boykin* (When the legislature made larceny of a firearm a felony, it did not intend to allow separate prosecutions for each firearm taken when several were taken at one time.).

In *Gardner*, the Supreme Court's decision that the two offenses involved there were intended to be separately punished

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State v. Hurst

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was based partly on the juxtaposition of the offenses within the statutory scheme. 315 N.C. at 462, 340 S.E. 2d at 713. The Court noted that breaking or entering was placed under Article 14 of Subchapter IV, entitled "Offenses Against the Habitation and Other Buildings" while larceny was located under Article 16 of Subchapter V, entitled "Offenses Against Property." Applying this reasoning to the case at bar, we note that armed robbery was placed under Article 17 within the same subchapter as larceny, Subchapter V, entitled "Offenses Against Property."

The Court in *Gardner* also considered prior judicial treatment of the offenses:

[T]his Court has uniformly and frequently held, from as early as the turn of the century, that breaking and/or entering and larceny are separate and distinct crimes. . . . Our appellate courts have also sustained convictions for both breaking or entering and felony larceny pursuant to breaking or entering in a single trial. . . . It would appear that we have also approved multiple punishments for both offenses. See *State v. Morgan*, 265 N.C. 597, 144 S.E. 2d 633 (1965), *overruled on other grounds*, 275 N.C. 439, 168 S.E. 2d 401 (1969). These many years of uniform construction have been acquiesced in by our legislature. Had conviction and punishment of both crimes in a single trial not been intended by our legislature, it could have addressed the matter during the course of these many years.<sup>2</sup>

315 N.C. at 462-63, 340 S.E. 2d at 713 (citations omitted).

Unfortunately, we are unable to demonstrate uniform construction of the offenses involved in this case. There appears to be a conflict between two lines of North Carolina Supreme Court decisions on whether larceny is a lesser included offense of armed robbery. On one hand, the most entrenched and lengthy series of cases stands for the principle that larceny is a lesser included offense of common law robbery,<sup>3</sup> and that both are lesser included

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2. The *Gardner* Court's reliance on *Morgan* is severely criticized in the three-justice dissent. It appears that, for one thing, the issue of multiple punishment for the offenses was not squarely raised or addressed in *Morgan*.

3. See *State v. Smith*, 268 N.C. 167, 150 S.E. 2d 194 (1966); *State v. Lawrence*, 262 N.C. 162, 136 S.E. 2d 595 (1964); *State v. Cody*, 60 N.C. 197 (1864); see also

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*State v. Hurst*

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offenses of armed robbery.<sup>4</sup> Of course, if the offenses committed are separate in time, separate in place, or directed at different victims, the defendant may be punished for each.<sup>5</sup>

On the other hand, three recent Supreme Court decisions, using a familiar version of the successive-prosecution "same evidence" test (whether each offense requires proof of an element that the other does not), listed the elements of larceny and armed robbery and concluded that the offenses are separate and distinct, rather than concluding that the former is a lesser included offense of the latter. *State v. Murray*, 310 N.C. 541, 548-49, 313 S.E. 2d 523, 529 (1984); *State v. Beaty*, 306 N.C. 491, 500-01, 293 S.E. 2d 760, 766-67 (1982); *State v. Revelle*, 301 N.C. 153, 163, 270 S.E. 2d 476, 482 (1980).

In these three opinions, however, the Court did not attempt to reconcile prior cases which uniformly held that larceny is a lesser included offense of armed robbery. And in only one of these cases, *Beaty*, did the Court suggest which element of larceny is not found in armed robbery:

For proof of armed robbery it is necessary to show the use or threatened use of a weapon but unnecessary to show *asportation*. For proof of larceny it is necessary to show *asportation* but unnecessary to show the use or threatened use of a weapon.

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*State v. Henry*, 57 N.C. App. 168, 290 S.E. 2d 775, *disc. rev. denied*, 306 N.C. 561, 294 S.E. 2d 226 (1982); *State v. Reid*, 55 N.C. App. 72, 284 S.E. 2d 519 (1981), *disc. rev. denied*, 305 N.C. 306, 290 S.E. 2d 707 (1982).

4. See *State v. Porter*, 303 N.C. 680, 281 S.E. 2d 377 (1981); *State v. Swaney*, 277 N.C. 602, 178 S.E. 2d 399, *appeal dismissed and cert. denied*, 402 U.S. 1006, 29 L.Ed. 2d 428, 91 S.Ct. 2199 (1971); *State v. Hatcher*, 277 N.C. 380, 177 S.E. 2d 892 (1970); *State v. Davis*, 242 N.C. 476, 87 S.E. 2d 906 (1955); *State v. Bell*, 228 N.C. 659, 46 S.E. 2d 834 (1948); see also *State v. Owens*, 73 N.C. App. 631, 327 S.E. 2d 42, *disc. rev. denied*, 314 N.C. 120, 332 S.E. 2d 488 (1985).

5. See *State v. Beaty*, 306 N.C. 491, 293 S.E. 2d 760 (1982) (Armed robbery of a single store employee is one robbery, even if property is taken from both employee and store.); *State v. Potter*, 285 N.C. 238, 204 S.E. 2d 649 (1974) (Armed robbery of store's property from two clerks is one robbery.); *State v. Johnson*, 23 N.C. App. 52, 208 S.E. 2d 206, *cert. denied*, 286 N.C. 339, 210 S.E. 2d 59 (1974) (Armed robbery of two persons, at same time in same place, where property of each taken constitutes two robberies.); cf. *State v. Richardson*, 279 N.C. 621, 633, 185 S.E. 2d 102, 115 (1971) (Lake, J., concurring).



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State v. Hurst

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306 N.C. at 501, 293 S.E. 2d at 767 (emphasis added). As far as we can discern, however, asportation (carrying away money or property) was an element of larceny even during the decades when the Supreme Court held that larceny was a lesser included offense of armed robbery. Indeed, it is difficult to understand how the element of asportation now could be the distinctive feature of larceny that makes it separate from, rather than included within, armed robbery. See *State v. Bobbitt*, 29 N.C. App. 155, 157, 223 S.E. 2d 398, 400 (1976) ("Of course, the taking and carrying away is an essential element of the crime of robbery."). More likely, asportation had always been implicitly subsumed within the armed robbery requirement that there be "an unlawful taking."<sup>6</sup>

More importantly, it is not clear that the Supreme Court intended to allow multiple punishment for larceny and armed robbery based on the *same taking*. In *Revelle*, the defendant had been charged with and convicted of felonious larceny, armed robbery, burglary, and rape. Although they all occurred in the same series of events, each crime was distinct in time and place. For example, the armed robbery was committed by taking property from two victims at gunpoint in their mobile home, and the felonious larceny occurred after the defendant had left the mobile home, when he took an automobile belonging to one of the victims. The Court held that the four felonies were "factually distinct and independent crimes in this case." 301 N.C. at 163, 270 S.E. 2d at 482.

In *Beaty*, the Court considered the situation of "a defendant charged with two counts of armed robbery resulting from the assault of a lone employee with property taken from both the employee and the business." 306 N.C. at 499, 293 S.E. 2d at 765-66. The Court arrested judgment on one of the two robbery convictions, finding the "controlling factor" to be "the existence of a single assault." *Id.* The Court held that the defendant could have been convicted of armed robbery of "either the attendant or the store but not both." The Court then stated that the "defend-

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6. Another element of larceny—that the defendant intend to permanently deprive the owner of his or her property—is not listed as an essential element of armed robbery in these recent Supreme Court cases. But it is, of course, an essential element. *Smith*, 268 N.C. at 169, 150 S.E. 2d at 198. This lends credence to the view that the list of elements often used for armed robbery is not literally exhaustive and that asportation is in fact an element of armed robbery.

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**State v. Hurst**

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ant could also have been convicted of a larceny from either [the attendant] or the ABC store had he been so charged." *Id.* at 500, 293 S.E. 2d at 766. It is not clear whether the Court's dicta means that the defendant could have been convicted of larceny of the attendant and armed robbery of the attendant, or whether the two convictions would have to relate to separate victims.

In *Murray*, the defendant had beaten and robbed the victim and had then stolen the victim's car. Although the Supreme Court compared armed robbery and larceny and concluded that the latter was not a lesser included offense of the former, it is clear from the facts of the case that even if larceny were included within armed robbery, the defendant committed one distinct act of robbery and then one distinct act of larceny.

None of the cases discussed above based the distinction between felonious larceny and armed robbery on the \$400 minimum value requirement. It may be argued that, although simple larceny and larceny from the person are lesser included offenses of armed robbery, felonious larceny based on the taking of goods worth over \$400 is a separate offense that does not merge with armed robbery. *See State v. Henry*, 57 N.C. App. 168, 169-70, 290 S.E. 2d 775, 776, *disc. rev. denied*, 306 N.C. 561, 294 S.E. 2d 226 (1982) (dicta); *see also Smith v. Cox*, 435 F. 2d 453 (4th Cir. 1970), *vacated on other grounds*, 404 U.S. 53, 30 L.Ed. 2d 209, 92 S.Ct. 174 (1971). *But see State v. Chapman*, 49 N.C. App. 103, 270 S.E. 2d 524 (1980) (Defendant was charged with armed robbery of a bag containing \$5,165.73 in cash; the Court held that in light of evidence that defendant did not use force before or concurrently with the taking, the trial court should have instructed on the lesser included offense of felonious larceny.).

Even if we assume that either asportation or the \$400 minimum value element of the felonious larceny charge and the weapon requirement for armed robbery make the two offenses separate and distinct, this Court must determine, following *Gardner*, whether the legislature has acquiesced in a consistent and uniform construction of the two crimes as separate offenses, thereby implicitly authorizing punishment for both offenses based on a single taking. Clearly, the legislature has not so acquiesced.

The crucial inquiry—whether the legislature intended to allow punishment for both offenses for a single taking from a

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State v. Hurst

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single victim at one time—was not resolved in *Murray, Beaty*, or *Revelle*, and we have found no cases in which multiple punishment has been imposed under G.S. Secs. 14-72 and -87 for a single taking. The *Gardner* factors, as applied to the case at bar, strongly suggest that the legislature did not intend to allow multiple punishment under the circumstances of this case.

## C

We believe the case at bar is similar to *State v. McGill*, 296 N.C. 564, 251 S.E. 2d 616 (1979). In *McGill*, defendant was charged with both possession of more than one ounce of marijuana and possession with intent to sell or deliver marijuana. The Supreme Court rejected defendant's argument that felonious possession was a lesser included offense of possession with intent to sell or deliver.

To prove the offense of possession of over one ounce of marijuana, the State must show possession and that the amount possessed was greater than one ounce. To prove the offense of possession with intent to sell or deliver marijuana, the State must show possession of any amount of marijuana and that the person possessing the substance intended to sell or deliver it. Thus, the two crimes each contain one element that is not necessary for proof of the other crime. One is not a lesser included offense of the other.

This does not mean, however, that a defendant can be punished for both offenses because of possession of the *same* contraband. Multiple punishment is one facet of the prohibition against double jeopardy. See *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977). That rule applies "[w]here two or more offenses of the same nature are by statute carved out of the same transaction and are properly the subject of a single investigation." *State v. Midgett*, 214 N.C. 107, 110, 198 S.E. 2d 613, 614 (1938) (quoting *Dowdy v. State*, 158 Tenn. 364, 366, 13 S.W. 2d 794, 794 (1929)). See also *In re Powell*, 241 N.C. 288, 84 S.E. 2d 906 (1954).

*Id.* at 567-68, 251 S.E. 2d at 619; accord *State v. Pagan*, 64 N.C. App. 295, 307 S.E. 2d 381 (1983). This principle also applies to the crimes of larceny and receiving stolen property when they are applied to the same property. *State v. Meshaw*, 246 N.C. 205, 98 S.E. 2d 13 (1957); *In re Powell*, 241 N.C. 288, 84 S.E. 2d 906 (1954).

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**State v. Hurst**

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We conclude that larceny of goods worth over \$400 and armed robbery of the same goods from the same person at one time are mutually exclusive offenses; that is, if a defendant is punished for one, he cannot be punished for the other based on the same taking. *Cf. McGill*. Nothing in the statutes suggests a contrary legislative intent. Neither statute provides that armed robbery of goods worth over \$400 is punishable under both statutes. *Compare Missouri v. Hunter*, 459 U.S. 359, 74 L.Ed. 2d 535, 103 S.Ct. 673 (1983).

Were we to rule otherwise, every armed robbery in which property worth over \$400 were taken also would constitute felonious larceny. For example, if A uses a weapon to take B's wallet, and the wallet contains over \$400, A could be punished for two crimes: armed robbery of the wallet and felonious larceny of the money. Similarly, as in the case at bar, if A uses a weapon to steal a car from B, and an item of B's personal property is in the car, A would commit two offenses: armed robbery of the item in the car and felonious larceny of the car (usually worth over \$400). And what if the car were equipped with a ski rack or contained a removable cassette deck, seat covers, or a spare tire? Would the defendant be subject to punishment for both felonious larceny of a car and armed robbery of a component part of the car to be defined by the prosecutor?

The State would have us establish by judicial fiat two degrees of armed robbery: (1) ordinary armed robbery (if the goods taken are worth \$400 or less), and (2) aggravated armed robbery, that is, armed robbery plus felonious larceny (if the goods taken are worth over \$400 and *any* other item is taken, even incidentally). We do not interpret this to be the will of the legislature. Courts should avoid interpreting criminal statutes to increase penalties absent clear legislative intent. *See Albermar v. United States*, 450 U.S. 333, 67 L.Ed. 2d 275, 101 S.Ct. 1137 (1981). If the legislature wishes to increase the penalty for armed robbery when goods worth over \$400 are taken, it is free to do so.

In sum, the defendant cannot be punished for felonious larceny and armed robbery based on a single taking from one person at one time. Judgment is arrested on the felonious larceny conviction. *See Hatcher*.

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**Southern Watch Supply Co. v. Regal Chrysler-Plymouth**

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## X

[6] The armed robbery and felonious larceny convictions were consolidated for judgment and sentencing. The presumptive sentence for armed robbery is fourteen years, G.S. Sec. 14-87(d), and for felonious larceny, three years, G.S. Sec. 14-72(a) (Class H felony); N.C. Gen. Stat. Sec. 15A-1340.4(f)(6) (1983). Because defendant's twenty-year sentence exceeded the total of the presumptive terms, the court was required to make specific findings in aggravation and mitigation. G.S. Sec. 15A-1340.4(b). The court did not indicate, however, whether the additional years were added for the armed robbery or the felonious larceny conviction, or both. Because one of the aggravating factors (defendant induced others to participate in the offense) might apply to either one or both convictions, the case must be remanded for resentencing. *Cf. State v. Miller*, 316 N.C. 273, 341 S.E. 2d 531 (1986).

For the reasons set forth above, judgment is arrested on the felonious larceny conviction, the armed robbery conviction is upheld, and the case is remanded for resentencing.

Felonious larceny—judgment arrested.

Armed robbery—no error.

Remanded for resentencing.

Judges WHICHARD and PARKER concur.

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SOUTHERN WATCH SUPPLY COMPANY, INC. v. REGAL CHRYSLER-  
PLYMOUTH, INC. AND CHRYSLER CORPORATION

No. 8526SC772

(Filed 15 July 1986)

**1. Negligence § 29.1— theft from car trunk—serial number of car keys given by dealer to telephone caller—evidence of negligence sufficient**

There was sufficient evidence of negligence and proximate cause to support a verdict for plaintiff in an action arising from the theft of jewelry from an automobile trunk where the Court of Appeals had previously ruled that plaintiff's forecast of evidence had raised issues of fact for the jury and where

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**Southern Watch Supply Co. v. Regal Chrysler-Plymouth**

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there was evidence that the jewelry was stolen from the trunk of plaintiff's salesman's car; the car had an alarm system that would not go off when the trunk was opened with a key but would when even slight pressure was applied to the trunk; defendant's employees serviced the car and the burglar alarm and knew that jewelry was kept in the car; an unknown man telephoned defendant's offices and said that he was calling for the salesman to get serial numbers of the car keys because the salesman had lost his car keys and needed to have new keys made; defendant's employee gave the caller the serial numbers of the keys; a witness later saw a man open the trunk of the salesman's car, apparently with a key, and remove a sample case; the salesman discovered four of the sample cases missing when he returned to the car; and officers ascertained that the trunk had not been pried or forced open.

**2. Evidence §§ 28 and 33.1 — theft from automobile — negligence action — police report — admissible**

The trial court did not err in a negligence action arising from the theft of jewelry from an automobile trunk by admitting into evidence the portion of the official police record called incident/investigation report where the officer who testified about the report did not make the report. The officer who testified was present when the victim was interviewed, the car examined, the car's burglar system tested, and the remaining sample case examined; the officer testified that what was in the report was exactly what he heard; the report was not received as evidence that the statements contained therein were true but for the purpose of showing that a report was made; everything of consequence in the report was established by other testimony to which defendant did not object; and the evidence was admissible as substantive evidence under the excited utterance exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 801 and Rule 803(2).

**3. Evidence § 29; Damages § 13 — negligence action — list of stolen jewelry — admissible**

The trial court did not err in a negligence action arising from the theft of jewelry from an automobile by admitting an exhibit which purported to list all the articles of jewelry that were stolen and their wholesale prices. It is no basis for objection that the list was made after the incident; the information was relevant and material; the exhibit's foundation and authentication were sufficient; evidence to the same effect was introduced without objection; and arguments concerning the manner in which the exhibit was made went to its weight rather than its admissibility.

**4. Damages § 13.3 — stolen jewelry — list of wholesale prices — evidence of damages**

In a negligence action arising from the theft of jewelry from an automobile, an exhibit prepared by plaintiff which listed all the articles of jewelry stolen and their wholesale prices but did not mention the words "fair market value" provided evidence of damages; it is not the law that evidence not couched in the terminology of fair market value is necessarily without effect in proving damages.

Chief Judge HEDRICK dissenting.

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**Southern Watch Supply Co. v. Regal Chrysler-Plymouth**

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APPEAL by defendant Regal Chrysler-Plymouth, Inc. from *Downs, Judge*. Judgment entered 27 February 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 December 1985.

In suing plaintiff automobile dealer for the value of jewelry stolen from the locked car of one of its salesmen plaintiff alleged that the theft was facilitated by an employee of defendant negligently telling an unidentified telephone caller the serial numbers of the car keys. After discovery was completed defendant's motion for summary judgment was granted, apparently upon the theory that the projected proof raised no genuine issues of fact as to defendant's negligence and causation. Upon appeal we reversed, holding that plaintiff's forecast of evidence raised jury questions on both issues. *Southern Watch Supply Co. v. Regal Chrysler-Plymouth*, 69 N.C. App. 164, 316 S.E. 2d 318, *disc. rev. denied*, 312 N.C. 496, 322 S.E. 2d 560 (1984). In the trial that followed the jury found for its verdict that plaintiff was damaged in the amount of \$59,488.31 by defendant's negligence and judgment was entered thereon. Pertinent to defendant's appeal the evidence presented was to the following effect:

In 1980 the plaintiff, a seller of jewelry at wholesale since 1931, employed Paul E. Yandle as a traveling salesman to solicit orders from various retail jewelry stores situated in this state. Yandle had been selling jewelry for plaintiff for about 35 years, and in doing his work he used his own car and jewelry samples that plaintiff supplied at the beginning of each sales season. The sample jewelry filled five leather cases or bags that Yandle kept in the trunk of his automobile. The car was equipped with a burglar alarm system that would not go off when the trunk was opened with a key, but would when even slight force was applied to the trunk; once at Yandle's home it went off when a neighbor's child hit the trunk with a ball. When calling on a customer store Yandle would take only one or two sample cases into the store and would leave the others in the trunk of the car. Defendant's employees had serviced Yandle's cars during the preceding twenty years and knew that he kept jewelry in the car. During that time they periodically checked and serviced the burglar alarm system, and each time Yandle traded cars they took the burglar alarm system from the old car and installed it in the new one. In 1980 Yandle was using a Chrysler that he bought from defendant

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**Southern Watch Supply Co. v. Regal Chrysler-Plymouth**

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in 1978. The car had two sets of keys, neither of which had ever been lost, and Yandle carried both sets with him all the time. A locksmith that knows the make and model of a car and the serial numbers of its keys and that has a key code book, as certain approved locksmiths do, and knows how to decipher the code can duplicate the keys in a few minutes without seeing the car; but without that information a locksmith has to go to the vehicle and make impressions of the locks with tools designed for that purpose.

On 21 February 1980 while Yandle was calling on jewelry stores in Lenoir, an unknown man telephoned the office of defendant in Charlotte and told an employee that he was calling for Yandle from Hickory and that Yandle had lost his car keys and needed the serial numbers in order to have new keys made with which to get into his car. The employee looked up the serial numbers and gave them to the caller. About 11:15 the next morning, while Yandle was calling on a jewelry store in Hickory and his car was parked in the mall parking lot nearby, an unidentified man opened the trunk of the car and stole four sample cases of jewelry worth \$59,488.31. Though unaware of it at the time Mrs. Margaret White, who had been shopping in another nearby store, saw the theft committed. While returning to her car in the parking lot she saw a man hurry by her, stop at a Chrysler automobile later identified as Yandle's, open the trunk in one swift movement, apparently with a key, and remove one of the four leather sample cases or bags that almost filled the trunk and set it on the ground. By then she was at her own car, saw and heard nothing more, and gave the incident no further thought until the next day when she read about the theft in the newspaper. She then reported what she had seen to the police and described the man involved as being quite different from Yandle, who she saw for the first time at the police station later. Yandle returned to his car a few minutes after the theft occurred, noticed the missing sample cases, called the police, and several officers were on the scene shortly thereafter. The officers checked Yandle's car, including the burglar alarm system and the one jewelry sample case that Yandle had left, and ascertained that the trunk of the car had not been pried or forced open. Continuing their investigation they later took statements from Yandle, Mrs. White, a locksmith, and several employees of defendant, one of whom admitted talking on



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**Southern Watch Supply Co. v. Regal Chrysler-Plymouth**

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the telephone with the unidentified caller and giving him the serial numbers of Yandle's car keys. But the investigation has not led to the identification of the thief or the recovery of any of the stolen jewelry. Paul Yandle died in September 1982, three months before the summary judgment hearing, and no deposition or other evidence from him was presented either at the hearing or at the trial.

*Levine and Levine, by Miles S. Levine and J. Christopher Oates, for plaintiff appellee.*

*Wardlow, Knox, Knox, Freeman & Scofield, by John S. Freeman, John B. Yorke and Mark T. Sumwalt, for defendant appellant.*

PHILLIPS, Judge.

[1] The only questions presented by defendant's appeal are whether the court erred in receiving into evidence two exhibits offered by the plaintiff and in ruling that the evidence is sufficient to warrant and support the verdict. In our opinion the court erred in neither respect. As to the sufficiency of the evidence, defendant's contentions that negligence and proximate cause have not been proven require no discussion, because when this case was here before, *Southern Watch Supply Co. v. Regal Chrysler-Plymouth*, 69 N.C. App. 164, 316 S.E. 2d 318, *disc. rev. denied*, 312 N.C. 496, 322 S.E. 2d 560 (1984), we held that plaintiff's forecast of evidence on the negligence and proximate cause issues raised issues of fact for a jury to determine and substantially the same evidence was presented at trial. *Johnson v. Southern Railway Co.*, 257 N.C. 712, 127 S.E. 2d 521 (1962). Even if those issues had not been ruled on earlier it is clear to us that the evidence above stated tends to show that defendant was negligent and that plaintiff's loss proximately resulted therefrom. Defendant's contention that the verdict as to plaintiff's damages is unsupported by evidence—an issue not raised by the former appeal—will be discussed following our ruling on the admissibility of Plaintiff's Exhibit 7, which concerns the value of the stolen jewelry.

[2] The first exhibit that defendant contends was erroneously received into evidence, Plaintiff's Exhibit 2, consists of the first two pages of the 49-page official record of the Hickory Police Department's investigation of the jewelry theft here involved. The two pages, entitled Incident/Investigation Report and dated 2-22-80,

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**Southern Watch Supply Co. v. Regal Chrysler-Plymouth**

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state that at 11:29 a.m. a report was received from Paul Yandle that his Chrysler automobile parked in the Union Square East Mall parking lot had been broken and entered a few minutes earlier and some jewelry stolen therefrom. In addition to data about Yandle, his employer, the car, the place, and the missing articles, the report states that it was submitted by Officer S. L. Rhyne at 4:30 p.m. that day and that:

On 2-22-80 at 1130 hours Officer Rhyne met with Mr. Paul Yandle at Union Square East Mall parking lot in reference to a breaking and entering of vehicle and larceny from vehicle. Mr. Yandle advised this officer that he parked his vehicle at 1100 hours 2-22-80 in the East Lot of Union Square. At [about] 1120 hours Mr. Yandle stated that he returned to his vehicle to get a sample case out of his trunk. Mr. Yandle advised when he opened the trunk of the vehicle that (4) four sample jewelry cases of assorted jewelry (see itemized list) were missing. Missing were (1) one blue case and (3) brown cases all containing jewelry. Value stolen is listed at \$57,338.86 as of Fall 1979 price list.

H.P.D. Evidence Technicians was (sic) called to the scene to process evidence as was (sic) Detectives Wiles and Hunt.

There are no suspects at this time.

Mr. Yandle advised that the vehicle trunk has an alarm, however, the alarm was not set off at the time of the incident.

The exhibit was received into evidence during the testimony of Hickory Police Detective Larry Wiles, who met Officer Rhyne and Yandle in the mall parking lot immediately after the theft was reported and investigated the case for several weeks thereafter. Defendant contends that the report was inadmissible because Officer Wiles did not make it and because it contained hearsay upon hearsay. We disagree for several reasons. First, though Officer Wiles did not make the report, he was there when Yandle was interviewed, the car was examined, the burglar alarm system tested, and the sample case that Yandle had left was examined, and testified: "What is on that report is exactly what I heard." Second, the exhibit did not violate the hearsay rule because it was not received as evidence that the statements contained therein

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**Southern Watch Supply Co. v. Regal Chrysler-Plymouth**

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were true. G.S. 8C-1, Rule 801, N.C. Evidence Code. It was received, so the court instructed the jury, "for the limited purpose of simply showing that a report was made," which is an appropriate purpose under the law, not forbidden by the hearsay rule. For our Supreme Court has said: "The hearsay rule does not apply to testimony that a particular statement was made by some person other than the witness when the fact sought to be established is the making of the statement itself, as distinguished from the truth of the matter so stated." *Wilson v. Hartford Accident and Indemnity Co.*, 272 N.C. 183, 188, 158 S.E. 2d 1, 5 (1967). Furthermore, everything of consequence stated in the report was established by other testimony that defendant did not object to. That Yandle parked his car in the parking lot around 11 o'clock that morning and it then had four sample jewelry cases in the trunk is indicated by Mrs. White's testimony that she saw the four cases in the car trunk between 11 o'clock and 11:15. That the car was thereafter broken into and the cases stolen from it is indicated by Mrs. White's testimony that she saw a stranger hastily open the car trunk and remove one of the cases between 11 o'clock and 11:15; by the testimony of Detective Wiles that the cases were not there when he examined the car at 11:30; and by the testimony of plaintiff's general manager that "four cases had been stolen." Thus, even if the exhibit was incompetent, and we do not believe it was, its receipt cannot be regarded as prejudicial. *Wilson County Board of Education v. Lamm*, 276 N.C. 487, 173 S.E. 2d 281 (1970). Finally, as has been ruled by our Supreme Court under similar circumstances, Yandle's statement to the officer was also admissible as substantive evidence on other grounds. In *State v. Odom*, 316 N.C. 306, 341 S.E. 2d 332 (1986), the description of an abduction that was related to a police officer by an eyewitness ten minutes after he saw it was received as substantive evidence as a present sense impression exception to the hearsay rule, as provided in N.C. Evidence Rule 803(1), though the witness had died during the interim. In this case Yandle's statement concerning his detection of the theft of the jewelry cases was made within two or three minutes of the discovery. Too, evidence having been offered that Yandle was so upset by the theft that he was scarcely able to talk for a long while and even became ill, his statement to the officers could have been received also as substantive evidence under the excited utterance exception to the hearsay rule, as provided in Rule 803(2).

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**Southern Watch Supply Co. v. Regal Chrysler-Plymouth**

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[3] The other exhibit that defendant objected to—Plaintiff's Exhibit 7—purports to list all the articles of jewelry that were stolen and their wholesale prices, which amount to \$59,488.31 altogether. The objection has no legal basis and other evidence to the same effect was introduced without objection in any event. The basis first stated for the objection was that the list was made "after the incident and it is clearly marked 2/25/80." This is no basis at all, of course, since a list of the stolen articles could not have been made before the theft occurred, and no argument to the contrary is made in the brief. The basis next stated for the objection—after plaintiff's counsel stated the exhibit was being introduced only to illustrate the testimony of plaintiff's general manager—was that "it is not relevant." Yet the exhibit purports to identify each piece of jewelry that was stolen and state its wholesale value or price, information that was not only relevant but material to the issues being tried. Nor is this basis for excluding the evidence pursued in defendant's brief. What is contended, for the first time, is that no proper foundation was laid for the exhibit and that it was not properly authenticated. Even if those had been the stated bases for the objection in the trial court, the contention has no merit. According to the evidence the list was prepared by the witness Linda Daniels after checking the jewelry samples Yandle had left after the theft against a list of the articles that were given to him earlier. She testified, in substance, that: For several years she had organized and selected the sample lines given to each salesman; each article that she gave to a salesman was listed with its wholesale price and he was held accountable therefor; when the line was turned in at the end of the sales season each article returned was checked against that record; when the sample line Yandle had in February 1980 was given to him in June 1979, she listed each article and its wholesale price; and when Yandle returned to the office following the robbery, she checked the jewelry samples that he still had against the list of articles given to him the preceding June and thereafter and Plaintiff's Exhibit 7 was the result. There was also evidence that Yandle meticulously safeguarded the jewelry samples given to him and that during his long career as a jewelry salesman he failed to retain and turn in from the jewelry entrusted to him only one tray, which a store customer stole twenty years earlier while Yandle was showing his other wares to the store owner. This is certainly foundation and authentication enough for the ex-

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**Southern Watch Supply Co. v. Regal Chrysler-Plymouth**

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hibit to be received as evidence. Despite rhetoric to the contrary defendant's arguments all go to the weight of this exhibit, rather than its admissibility. One weakness that defendant argues invalidates the exhibit is that while Mrs. Daniels filled each sample case that she gave Yandle with articles made by the same jewelry manufacturer, he thereafter rearranged the cases by putting articles that were similar to each other together although made by different manufacturers. But this practice only rendered the accountability process more cumbersome; it did not render it unreliable, as the same process was used with absolute accuracy on many previous occasions, according to the evidence. Another weakness strongly relied on by defendant is that the list Mrs. Daniels testified that she made when delivering the jewelry to Yandle in June 1979, and used February 25, 1980 in preparing Exhibit 7, was not to be found when she testified in court five years later. While the absence of the master list could have caused the jury to doubt there ever was such a list or that Mrs. Daniels accurately checked against it when Yandle's remaining samples were turned in after the theft, Mrs. Daniels' testimony that she made the master list and used it properly in compiling Exhibit 7 was for the jury to assess, not us. And as was the case with the other exhibit, no prejudice resulted to defendant in any event, since evidence to the same effect was introduced without defendant objecting thereto. Mr. Ashendorf testified:

Plaintiff's Exhibit 7 is a list of the merchandise which was determined to have been missing from the cases that Mr. Yandle brought back from the entire line. . . . The total amount of the cost of the missing items is calculated here, \$59,488.31.

And Mrs. Daniels testified:

Plaintiff's Exhibit 7 is a list that I made of the items missing from Paul Yandle's sample line at the time of the robbery. It is in my handwriting. I made this total. . . . The total amount according to the wholesale prices that was missing was \$59,488.31, and I calculated that amount myself.

[4] In gist, the basis for defendant's contention that the above stated evidence has no tendency to show that plaintiff suffered any damages at all by the theft of its jewelry, and that a directed verdict or judgment notwithstanding the verdict should have

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Southern Watch Supply Co. v. Regal Chrysler-Plymouth

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been entered for that reason, is that the words "fair market value" are not contained therein. But while "fair market value" is the legal measure of damages in suits for lost or destroyed personal property, *Kaplan v. City of Winston-Salem*, 286 N.C. 80, 209 S.E. 2d 743, *reh. denied*, 286 N.C. 548, --- S.E. 2d --- (1974), it is not the law, as defendant maintains, that evidence not couched in the terminology of fair market value is necessarily without effect in proving such damages. The fair market value of personal property can be deduced from a variety of other evidence, including the price paid or received for the same or similar property, if the time is not too remote and the circumstances indicate that neither party was under compulsion to buy or sell.

Voluntary sales of similar property, in the same locality and reasonably near in point of time to the date in question, and the prices at which such sales were made, are generally held admissible to prove the market value of personalty, provided the sales are comparable, and under similar terms and conditions.

32 C.J.S. *Evidence* Sec. 593(5) (1964). Indeed, we have it on ancient and impeccable authority that under appropriate circumstances the price paid is fair market value evidence of the highest kind, stronger even than an opinion deliberately expressed. In *Boggan v. Horne*, 97 N.C. 268, 270, 2 S.E. 224 (1887), the court said as to defendant testifying that he paid \$75 for the horse involved:

[W]e may consider that as an *estimate* of value and but an opinion expressed. The actual purchase at the price is an act done in pursuance of an opinion and imparts greater force to it. (Emphasis in original.)

We note that in printing the above the North Carolina Reports (but not the Southeastern Reporter) uses the word *not* in place of *but*—which is a mistake as the rest of the quotation indicates and the original handwritten opinion in the State Archives Library plainly shows. Still earlier, the Court held that:

The price given by the purchaser, and that for which he sold it, do not, conclusively, fix the amount of damages. But it is competent as *some* evidence of the value of the property at the respective times of the purchase and the sale, and as such the jury had a right to have it.

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**Southern Watch Supply Co. v. Regal Chrysler-Plymouth**

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*Small v. Pool*, 30 N.C. 47, 48 (1847). (Emphasis theirs.)

Thus, under the peculiar circumstances of this case the wholesale price of the stolen articles as stated on the exhibit and testified to by Mr. Ashendorf and Mrs. Daniels can be fairly regarded as the informed, experienced opinion of the witnesses that the prices established were also the fair market value of the articles involved. How could it be regarded otherwise, since plaintiff was in the business of selling the articles at wholesale and Mr. Ashendorf and Mrs. Daniels had selected and priced them for sale in the wholesale market? Another reason that the wholesale price of the articles was evidence of their fair market value is that, according to the evidence, the articles involved were regularly and routinely sold at that price in the free marketplace, the ultimate proof of value, it would seem, manifestly superior to the other proofs approved by the law, such as opinion testimony and market quotations.

No error.

Judge JOHNSON concurs.

Chief Judge HEDRICK dissents.

Chief Judge HEDRICK dissenting.

I cannot agree with the majority that the evidence in the record is sufficient to support the verdict that plaintiff was damaged in the sum of \$59,488.31. The only evidence in this record as to the value of the stolen jewelry comes from the list prepared by Ms. Daniels. Mr. Ashendorf testified that the value of the items stolen was calculated based on a list of the wholesale values which he had prepared eight months before the loss. It must be remembered that the plaintiff sold the jewelry at wholesale. It is clear that Mr. Ashendorf's figure of \$59,488.31 included the price for which the plaintiff had purchased the jewelry plus a reasonable profit. The burden is on the plaintiff to establish the amount of damage it sustained because of the loss of the jewelry due to the negligence of defendants. Since the measure of damages is the fair market value of the jewelry stolen, it does not seem unreasonable to require plaintiff to offer evidence of the fair market value of the jewelry stolen. While the testimony of Mr.

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In re Appeal of CAMA Permit

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Ashendorf may be *some* evidence of the value, I am not satisfied that this evidence alone is sufficient to support the verdict, and this is especially true, in this case, where the judge's instructions to the jury with respect to damages are so inadequate as to afford the jury no guidance whatsoever in answering the issue as to damages. Indeed, the court did not even instruct the jury that plaintiff was entitled to recover only the fair market value of the jewelry if it determined that plaintiff was entitled to recover. I realize that defendant did not object at trial to the instructions, as required by Rule 10 of the Rules of Appellate Procedure. I also realize that the erroneous and prejudicial instructions as to damages did not afford defendant a fair trial on this issue and could very well have led to a miscarriage of justice because of the lack of definitive evidence as to the fair market value of the jewelry stolen. I vote to award defendant a new trial on the issue of damages alone.

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IN THE MATTER OF THE APPEAL FROM THE ISSUANCE OF A CAMA  
MINOR DEVELOPMENT PERMIT NO. 82-0010 TO FORD S. WORTHY BY  
TOWN OF BATH AND BATH PRESERVATION ASSOCIATION

No. 852SC1157

(Filed 15 July 1986)

**1. Municipal Corporations § 30.11— zoning restrictions on marinas—proper**

An amendment to a zoning ordinance prohibiting further development of wet and dry boat storage at marinas in Bath was not unconstitutionally adopted where the evidence in the record supported the conclusion that the regulation of marinas by prohibiting further development of wet and dry boat storage would achieve the objectives of maintaining aesthetic qualities and water quality control, which are within the police power of the State and are consistent with the Coastal Area Management Act; moreover, the ordinance promotes the public welfare and its benefit to the public substantially outweighs any interference with private property rights. N.C.G.S. § 113A-102.

**2. Municipal Corporations § 30.22— restrictions on marinas—petitioner not arbitrarily singled out**

The trial court's findings of fact supported its conclusion that ordinances in the Town of Bath restricting marinas were not arbitrarily aimed at petitioner "due to the consideration of other pending marina issues by the Town . . . ."



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**In re Appeal of CAMA Permit**

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**3. Municipal Corporations § 30.21— revisions to zoning ordinance—new hearing not required**

Revisions to a zoning ordinance were not void for failure of the Town to follow its own procedural rules and those of N.C.G.S. § 160A, Art. 19, where the Town Planning Board considered standards relating to marinas in connection with the revised zoning ordinance and updated Land Use Plan during the spring of 1982 and certified proposed zoning ordinances to the Town Board of Commissioners; a public hearing was held in which petitioner participated and revisions were made as a result of public comment received at the hearing; and the revisions were adopted as a part of the revised zoning ordinance on 14 June.

**4. Municipal Corporations §§ 30.20, 31— proposed zoning ordinance—revisions—additional public hearing not necessary**

The Town of Bath was not required to hold another public hearing on revisions to a proposed zoning ordinance or to refer the ordinance back to the Planning Board where the proposed ordinance was properly noticed for public hearing; the notice pertained to the entire proposed ordinance and was sufficiently broad to indicate the possibility of substantial changes as a result of public discussion; and the meeting was attended by a large number of citizens and the provisions relating to marina development were the subject of considerable discussion, including comments and proposed changes by petitioner. Moreover, petitioner was banned from attacking the validity of the amendment on procedural grounds by the statute of limitations. N.C.G.S. § 160A-364.1, N.C.G.S. § 1-54.1.

**5. Municipal Corporations § 31— revocation of development permit—moot—N.C.G.S. § 160A-385 not retroactive**

The question of whether the revocation of a CAMA minor development permit was proper was rendered moot by the adoption of a revised zoning ordinance and the revocation of petitioner's certificate of compliance. A subsequent amendment to N.C.G.S. § 160A-385 prohibiting such revocations was not intended to apply retroactively and petitioner did not show that he made any substantial expenditures in reliance upon the certificate of compliance.

**6. Municipal Corporations § 31.2— town allowed additional time to file evidence—raised for first time on appeal**

Petitioner could not raise for the first time in the Court of Appeals the issue of whether he was prejudiced in a hearing concerning the revocation of a CAMA permit by the trial court's allowing the Town additional time to file documentary evidence and affidavits where, although petitioner took exception to the additional time, there was nothing in the record to indicate that he objected to the court's consideration of those affidavits or that he sought a continuance in order to obtain additional affidavits of his own or an opportunity to offer evidence in rebuttal.

**APPEAL** by petitioner from *Watts, Judge*. Order entered 22 May 1985 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 12 March 1986.

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**In re Appeal of CAMA Permit**

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On 5 March 1982, petitioner, Ford S. Worthy, Jr., submitted an application, pursuant to the Coastal Area Management Act (CAMA), to the local CAMA permit officer for Beaufort County for a permit to build a marina on his property located on Bath Creek within the planning jurisdiction of the Town of Bath. The proposed marina was to consist of boat slips for wet boat storage, parking, shower and restroom facilities, and gasoline and diesel fueling facilities. Petitioner was informed by the local permit officer that he needed to obtain a certificate from the Administrator of the Town of Bath that the proposed project complied with the town's zoning ordinance. On 6 March 1982, petitioner filed his application for a certificate with the Administrator of the Town of Bath and later revised the application on 6 April 1982, reducing the number of boat slips, number of parking spaces, and length of piers originally proposed.

On 15 April 1982, petitioner was issued a certificate of compliance by the Town of Bath subject to the condition that if an impending proposed new zoning ordinance be adopted, the certificate would be revoked. Thereafter, on 3 June 1982, the local CAMA permit officer issued petitioner a conditional CAMA minor development permit and a building permit subject to five conditions unrelated to the impending proposed zoning ordinance. On 8 June 1982, petitioner accepted the permit and the conditions set forth therein.

On 16 June 1982, the Town of Bath notified petitioner that his conditional certificate of compliance had been revoked, as provided by the condition attached to its issuance. On 21 June 1982, the Town filed notice of appeal to the Coastal Resources Commission, requesting an administrative hearing to review the issuance of the CAMA minor development permit to petitioner. After a hearing, the Coastal Resources Commission issued an Order dated 19 May 1983 revoking the permit due to an impermissible delegation of authority in one of the conditions imposed by the local permit officer.

Petitioner filed a petition for judicial review of the agency's decision on 15 June 1983. Respondent Coastal Resources Commission (Commission) responded to the petition and thereafter moved to dismiss it on the grounds of mootness. The motion to dismiss was based on revisions to the Zoning Ordinance for the Town of

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In re Appeal of CAMA Permit

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Bath, adopted by the Town Board of Commissioners on 14 June 1982, and amendments to the town's Land Use Plan adopted 8 August 1982, which, *inter alia*, prohibited further development of marinas which provided for either wet or dry boat storage. The Commission alleged that the Town of Bath had revoked, on 16 June 1982, the conditional certificate of compliance issued before the revision to the zoning ordinance, and that no construction had been initiated by petitioner. Petitioner replied, alleging that procedural irregularities and substantive due process violations in the adoption of the revised zoning ordinance rendered the ordinance invalid.

After a hearing, the trial court made findings of fact and concluded that the revised zoning ordinances adopted by the Town of Bath on 14 June 1982 were valid and, by reason thereof, the petition for judicial review had been rendered moot. From an order dismissing the petition, petitioner appeals.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Daniel F. McLawhorn, for Coastal Resources Commission, respondent appellee.*

*McMullan & Knott, by Lee E. Knott, Jr., for petitioner appellant.*

*Wayland J. Sermons, Jr., for Town of Bath, respondent appellee.*

MARTIN, Judge.

Assigning error to the dismissal of his petition for judicial review, petitioner contends that the amendment to the zoning ordinance, regulating marina development, was void *ab initio* because the Town of Bath violated procedural rules and substantive due process in amending the zoning ordinance. In the alternative, the petitioner contends that the trial court erred by not granting him, before it ruled on the motion to dismiss, an opportunity to respond to affidavits submitted by the Town of Bath in support of the motion. We have reviewed each of his contentions and affirm the order dismissing the petition.

[1] Petitioner initially contends that the amendment to the zoning ordinance was unconstitutionally adopted and void *ab initio* because the Town of Bath acted in "an unreasonable, discrimina-

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In re Appeal of CAMA Permit

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tory, illegal, arbitrary, and capricious manner" in amending the zoning ordinance to prohibit the development of wet and dry storage facilities at marinas. It is petitioner's argument that Bath's actions in amending the zoning ordinance were outside the scope of its authority, inconsistent with the Coastal Area Management Act, and purposely aimed at preventing the development of petitioner's project. We disagree.

In *Goodman Toyota, Inc. v. City of Raleigh*, 63 N.C. App. 660, 306 S.E. 2d 192, *disc. rev. denied*, 310 N.C. 477, 312 S.E. 2d 884 (1983), this Court outlined a two pronged test to determine whether zoning regulations comply with substantive due process.

First, the regulation must be designed to achieve objectives within the scope of police power. Second, it must seek to achieve those objectives by reasonable means, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L.Ed. 303, 47 S.Ct. 114 (1926). Whether the means are reasonable depends on their promotion of the public good and their reasonably minimal interference with the property owner's right to use his property as he deems appropriate. *ASP Associates v. City of Raleigh*, 298 N.C. 207, 214, 258 S.E. 2d 444, 449 (1979).

*Id.* at 663, 306 S.E. 2d at 194.

Our Supreme Court has held that aesthetic considerations alone may be the basis for ordinances and is a legitimate exercise of the police power. *State v. Jones*, 305 N.C. 520, 290 S.E. 2d 675 (1982).

Aesthetic regulation may provide corollary benefits to the general community such as protection of property values, promotion of tourism, indirect protection of health and safety, preservation of the character and integrity of the community, and promotion of the comfort, happiness, and emotional stability of area residents.

*Id.* at 530, 290 S.E. 2d at 681.

Support for using aesthetic, as well as water quality control, considerations as the basis for ordinances is found in the Coastal Area Management Act, G.S. 113A-100 *et seq.*, the provisions of which extend coverage of the Act to include the Town of Bath. The Coastal Area Management Act states as one of its legislative findings and goals the following:

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**In re Appeal of CAMA Permit**

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In the implementation of the coastal area management plan, the public's opportunity to enjoy the physical, esthetic, cultural, and recreational qualities of the natural shorelines of the State shall be preserved to the greatest extent feasible; water resources shall be managed in order to preserve and enhance water quality and to provide optimum utilization of water resources.

**G.S. 113A-102(a).**

The Act requires that the municipality develop a land use plan which is "consistent with the goals of the coastal area management system as set forth in G.S. 113A-102," G.S. 113A-110(a), and that the local ordinances be consistent with the local land use plan, G.S. 113A-111. The pertinent goals of the coastal area management system are the following:

(3) To insure the orderly and balanced use and preservation of our coastal resources on behalf of the people of North Carolina and the nation;

(4) To establish policies, guidelines, and standards for:

a. Protection, preservation, and conservation of natural resources including but not limited to water use, scenic vistas, and fish and wild life; . . . :

. . .

c. Recreation and tourist facilities . . . ;

. . .

e. Preservation and enhancement of the historic, cultural, and scientific aspects of the coastal area;

f. Protection of present common-law and statutory public rights in the lands and waters of the coastal area.

G.S. 113A-102(b). In *Adams v. North Carolina Dept. of Natural and Economic Resources*, 295 N.C. 683, 249 S.E. 2d 402 (1978), the sole case construing the Coastal Area Management Act, our Supreme Court held "that the unique, fragile and irreplaceable nature of the coastal zone and its significance to the public welfare amply justify the reasonableness of the special legislative treatment." *Id.* at 693, 249 S.E. 2d at 408.

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**In re Appeal of CAMA Permit**

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In the present case, the record reveals that the stated purposes for the revised zoning ordinance, which included the prohibition of further development of wet and dry boat storage at marinas, were (1) protection of the rights of fishing and navigation in Bath and Back Creeks, (2) protection of water quality to promote the commercial and recreational fishing industry, and (3) to require that development have no negative impacts upon the Town of Bath's aesthetic qualities. The revised zoning ordinance also included regulations on docks and length of piers, boats with open heads, fuel pumps, and storm water runoff protection devices. The local land use plan indicates that two significant characteristics of the Town of Bath are its historic character and natural water bodies. The evidence in the record supports the conclusion that the regulation of marinas by prohibiting further development of wet and dry boat storage will achieve the objectives of maintaining aesthetic qualities and water quality control which is within the police power of the State and is consistent with the Coastal Area Management Act.

We also conclude that the revised zoning ordinance achieves its objectives by reasonable means. The means are reasonable if the promotion of the public good outweighs the interference of the property owner's right to use his property as he deems fit. *Goodman Toyota, Inc. v. City of Raleigh, supra*. The record reveals that a property owner may still build piers and wharves; and he can use the land for other commercial purposes, including hotels, motels, restaurants, condominiums, and sales establishments. The ordinance promotes the public welfare in that it protects existing water quality, protects against unattractive structures, and preserves the fishing and recreational uses of Bath Creek, and its benefit to the public substantially outweighs any interference with private property rights.

[2] As to petitioner's contention that the Town, by adopting the revised zoning ordinance, had arbitrarily singled out and rendered impermissible his proposed project, the trial court found the following pertinent facts:

14. On February 8, 1982, the petitioner attended a Bath Planning Board meeting and participated in its continued discussions from prior meetings which culminated with a unanimous vote to eliminate marinas as an accepted use in

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**In re Appeal of CAMA Permit**

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the new Zoning Ordinances, with a second Motion carrying unanimously to develop strong marina standards if the Bath Town Board did not favor eliminating marinas entirely. This recommendation was part of a comprehensive set of proposed ordinances governing marinas, other docks, and water related development activities.

15. On March 6, 1982, the petitioner filed his first application to develop the marina site which site is the subject of the petition for judicial review. The petitioner supplemented the application by submission of additional materials on March 8, and 12, 1982.

16. On March 22 [sic], 1982, the Bath Town Board considered the above described recommendations of the Bath Planning Board and instructed the Planning Board to adopt stringent marina standards. The petitioner attended the meeting. The Board also considered a request to rezone an existing marina to a conforming use.

. . .

18. On April 15, 1982, the Town Zoning Administrator issued petitioner a Conditional Certificate of Zoning Compliance which included a notice that should a proposed zoning ordinance now pending before the Bath Town Council, which would render the certificate invalid, be adopted, the certificate will be revoked.

19. At the May 10, 1982 meeting of the Bath Town Board, the Bath Planning Board certified proposed zoning ordinances on marina standards to the Town Board. The Town Board set a public hearing on the proposed ordinances for June 8, 1982 and ordered notice of the hearing be published.

20. At the May 27, 1982 [sic] Bath Town Board held a special meeting during which Commissioner Ira Hardy stated to all in attendance, including petitioner, that he felt the overwhelming majority of people opposed adding more dry and wet dock storage facilities and that he would be interested in further discussion of the issue at the June 8, 1982 public hearing.

21. On June 14, 1982, the Town Board adopted the *Zoning Ordinances for the Town of Historic Bath, 1982*. The

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In re Appeal of CAMA Permit

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marina ordinances proposed by the Planning Board were amended to ban the construction of additional commercial wet and dry boat storage facilities. The amendments reflected comments and discussion at the June 8 public hearing.

22. On June 16, 1982, the Zoning Administrator notified the petitioner that his Conditional Certificate of Zoning Compliance was revoked due to its inconsistency with the zoning ordinance adopted on June 14, 1982. The petitioner had not undertaken any development of the marina when the certificate was revoked.

Findings of fact Nos. 15 and 18 were excepted to but not brought forward in petitioner's brief, therefore the exceptions are deemed abandoned. *Baker v. Log Systems, Inc.*, 75 N.C. App. 347, 330 S.E. 2d 632 (1985). Those findings along with findings of fact Nos. 14 and 19 which were not excepted to, are presumed to be supported by competent evidence and are conclusive on appeal. *Anderson Chevrolet/Olds, Inc. v. Higgins*, 57 N.C. App. 650, 292 S.E. 2d 159 (1982). Except for an apparently inaccurate date in finding of fact 16, the remaining findings of fact are amply supported by competent evidence appearing in the record, and the findings are therefore binding upon us. *Lumbee River Electric Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 309 S.E. 2d 209 (1983). These findings of fact fully support the trial court's conclusion that "[d]ue to the consideration of other pending marina issues by the Town, . . . the ordinances were not arbitrarily aimed at the petitioner."

[3] Petitioner's second contention is that the revisions to the zoning ordinance were void *ab initio* because the Town of Bath failed to follow its own procedural rules and those established by Chapter 160A, Article 19 of the General Statutes in enacting the revisions. Specifically, petitioner claims that the Town Board of Commissioners did not file the proposed amendments relating to marina development with the town clerk and refer it to the Planning Board for its recommendation and report before adoption as required by Section 12.03 of the Bath Zoning Ordinance and G.S. 160A-387. Petitioner further claims that the Town did not hold a duly advertised public hearing.

The record reveals that the Town Planning Board considered standards relating to marinas in connection with the revised zon-



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**In re Appeal of CAMA Permit**

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ing ordinances and updated Land Use Plan during the spring of 1982 and certified proposed zoning ordinances on marina standards to the Town Board of Commissioners. A public hearing was held on 8 June 1982, in which petitioner participated, and revisions in the proposals submitted by the Planning Board were made as a result of public comment received at the public hearing. The revisions were adopted as a part of the revised zoning ordinance on 14 June. The procedural irregularities claimed by petitioner do not exist.

[4] Petitioner argues that because the proposed zoning ordinance allowed for wet and dry storage of boats, the revisions prohibiting such use in connection with the development of a marina amounted to a radical departure from the ordinance as originally proposed and required another referral to the Planning Board and another public hearing. In *Heaton v. City of Charlotte*, 277 N.C. 506, 178 S.E. 2d 352 (1971), our Supreme Court held that

additional notice and public hearing ordinarily will not be required when the initial notice is broad enough to indicate the possibility of substantial change and substantial changes are made of the same fundamental character as contained in the notice, such changes resulting from objections, debate and discussion at the properly noticed initial hearing.

*Id.* at 518, 178 S.E. 2d at 359-60. The proposed zoning ordinance contained substantial revisions pertaining to marina development and was properly noticed for public hearing. The notice pertained to the entire proposed zoning ordinance and was sufficiently broad to indicate the possibility of substantial changes in the zoning ordinance, including those provisions relating to marina development, as a result of public discussion. The meeting was attended by a large number of citizens and the provisions relating to marina development were the subject of considerable discussion, including comments and proposed changes submitted by petitioner. Therefore, we conclude that there was no requirement to hold another public meeting or to refer the ordinance back to the Planning Board.

Moreover, even if the record disclosed that the Town of Bath had violated procedural rules in amending the ordinance, petitioner is barred from attacking the validity of the amendment based on procedural grounds by the statute of limitations provid-

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In re Appeal of CAMA Permit

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ed in G.S. 160A-364.1 and G.S. 1-54.1. More than nine months had passed between the adoption of the ordinance on 14 June 1982 and 8 February 1984, the date petitioner first challenged the validity of the ordinance in his reply to respondents' motion to dismiss his petition for review as moot.

[5] The trial court concluded that the 14 June 1982 zoning ordinances were valid and, by reason of the provisions of the ordinances regulating marina development, petitioner would be barred from obtaining a building permit and certificate of zoning compliance to construct the proposed marina. Therefore, even if the petitioner prevailed in his effort to overturn the order of the Coastal Resources Commission revoking his CAMA minor development permit, he would not be able to proceed with the proposed project. Thus, concluded the court, the passage of the 14 June 1982 zoning ordinances by the Town of Bath rendered moot any judicial review of the Coastal Resources Commission decision.

The doctrine of mootness applies

[w]henEVER, during the course of litigation it develops that the relief sought has been granted or that questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

*In re Peoples*, 296 N.C. 109, 147, 250 S.E. 2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L.Ed. 2d 297, 99 S.Ct. 2859 (1979).

The question brought into controversy by the Petition for Judicial Review involved the correctness of the Coastal Resources Commission's order revoking petitioner's CAMA minor development permit. The Commission contended that the question was moot by reason of the adoption of the revised zoning ordinance and amendments to the Town's Land Use Plan, and the Town's subsequent revocation of the certificate of compliance which it had previously issued. In *Keiger v. Winston-Salem Board of Adjustment*, 281 N.C. 715, 719, 190 S.E. 2d 175, 178 (1972), our Supreme Court stated:

It is the rule in this State that *the issuance* of a building permit, to which the permittee is entitled under the existing ordinance, creates no vested right to build contrary to the

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**In re Appeal of CAMA Permit**

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provisions of a subsequently enacted zoning ordinance, unless the permittee, acting in good faith, has made substantial expenditures in reliance upon the permit at a time when they did not violate declared public policy. (citations omitted) (emphasis original).

Petitioner contends, however, that recently enacted legislation prohibits the revocation of validly issued building permits due to subsequent changes in zoning regulations. In 1985, the General Assembly amended G.S. 160A-385 by adding a new paragraph:

Amendments, modifications, supplements, repeal or other changes in zoning regulations and restrictions and zone boundaries shall not be applicable or enforceable without consent of the owner with regard to lots for which building permits have been issued pursuant to G.S. 160A-417 prior to the enactment of the ordinance making the change or changes so long as the permits remain valid and unexpired pursuant to G.S. 160A-418 and unrevoked pursuant to G.S. 160A-422.

Session Laws 1985, Ch. 540, sec. 2 (First Sess. 1985). The amendment became effective 1 October 1985. Petitioner contends that we should apply the statute retroactively, to the end that the Town of Bath would have no right to revoke the certificate of compliance which it had issued before the revisions to the zoning ordinance. We decline to do so.

It is a generally recognized rule of construction that a statute will be given prospective application only and not retroactive application unless such intent is clearly expressed or arises by necessary implication from the terms of the statute. *Housing Authority v. Thorpe*, 271 N.C. 468, 157 S.E. 2d 147 (1967), *rev'd on other grounds*, 393 U.S. 268, 21 L.Ed. 2d 474, 89 S.Ct. 518 (1969); *Cable v. City of Asheville*, 314 N.C. 598, 336 S.E. 2d 59 (1985). We find no intent, either by express terms or by implication, in the amending act or statute to apply the amendment retroactively. The Town issued its certificate to petitioner on 3 June 1982 and the amendment to the zoning ordinance was adopted 14 June 1982, more than three years before the effective date of the amendment to G.S. 160A-385. Clearly, G.S. 160A-385, as amended and effective 1 October 1985, does not apply to this case.

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**In re Appeal of CAMA Permit**

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Petitioner has not shown that he made any substantial expenditures in reliance upon the conditional certificate of compliance issued him. We hold that the Town of Bath acted within its rights in revoking the certificate of compliance after it subsequently adopted revisions to its zoning ordinance prohibiting projects such as that proposed by petitioner. The proper revocation of the certificate by the Town, resulting in an inability by petitioner to proceed with the project, renders moot any decision concerning the propriety of the order of the Coastal Resources Commission revoking the CAMA minor development permit.

[6] Finally, petitioner contends that he was prejudiced when the trial court permitted the Town of Bath additional time to file documentary evidence and affidavits. The record shows that all parties were permitted until 29 March 1985 to submit documentary evidence and affidavits for consideration at a scheduled 9 April 1985 hearing. The Town of Bath objected to its joinder in the proceeding and asserted that, due to insufficient notice, it did not have sufficient time to obtain and file documentary evidence which it desired to offer. The trial court then rescheduled the hearing for 30 April 1985 and granted the Town an extension, until 25 April 1985, to file documentary evidence. The Town filed a number of affidavits on that date. Although petitioner took exception to the court's action in permitting the Town additional time to file documentary evidence, there is nothing in the record before us to indicate that petitioner objected at the hearing to the court's consideration of the affidavits submitted by the Town or that he sought a continuance in order to obtain additional affidavits of his own or any opportunity to offer evidence in rebuttal. Having declined to seek the aid of the trial court, he may not claim prejudice and seek assistance for the first time in this Court.

The order dismissing the petition for judicial review is affirmed.

Affirmed.

Chief Judge HEDRICK and Judge WELLS concur.

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**Masterclean of North Carolina v. Guy**

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**MASTERCLEAN OF NORTH CAROLINA, INC. v. JOHN GUY**

No. 8621DC131

(Filed 15 July 1986)

**1. Appeal and Error § 6.2— preliminary injunction—right of appeal**

A preliminary injunction restraining defendant from competing with his former employer in five states deprived defendant of a substantial right and is thus immediately appealable.

**2. Contracts § 7.1; Master and Servant § 11.1— covenant not to compete—unreasonable as to territory**

Provisions in a contract of employment with an asbestos abatement contractor that after termination of the employment, the employee would not engage in business or work for another in competition with the employer in any city or town in the United States in which the employer is doing or has signified its intention of doing business are patently unreasonable as to territory, and the trial court had no authority to vary or reform the contract by reducing the territory to five states.

**3. Master and Servant § 11— former employee—enjoining from working for competitor—insufficient evidence**

Plaintiff failed to show a reasonable apprehension of irreparable injury unless an injunction were granted restraining defendant, a former employee of plaintiff asbestos abatement contractor, from working for a competitor where plaintiff's president testified that plaintiff terminated defendant's employment; the vast majority of defendant's work was the actual removal of asbestos and only a small percentage of defendant's time was spent in customer contacts; plaintiff's operating and safety procedures were unique but not secret; competitors visit each other's job sites and could observe many of the procedures used by plaintiff; plaintiff used procedures suggested by manuals pertaining to asbestos removal; and companies in the business of asbestos removal basically used the same type of equipment.

**APPEAL** by defendant from *Gatto, Judge*. Judgment entered 5 December 1985 in District Court, FORSYTH County. Heard in the Court of Appeals 5 June 1986.

On 11 May 1982, plaintiff Masterclean of North Carolina, Inc., employed defendant John Guy, as a laborer. Plaintiff is a corporation with its principal place of business in Forsyth County, North Carolina. Since 1979, plaintiff has been engaged in the business of asbestos abatement, containment and removal. When plaintiff employed defendant, the parties entered into an employment agreement with a covenant not to compete and a covenant not to disclose confidential information and trade secrets. The pertinent restrictions of the covenant not to compete were as follows:

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**Masterclean of North Carolina v. Guy**

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NOW, THEREFORE, for and in consideration of this initial employment, and the compensation to be earned and paid to the employee hereunder, said employee covenants and agrees that he will not during the term of this employment, and for a period of five whole years thereafter, engage directly or indirectly for himself or as agent, representative or employee of others in the same kind or similar business as that engaged in by the company (1) in Forsyth County, North Carolina, or (2) in any other city, town, borough, township, village or other place in the State of North Carolina, in which the Company is then engaged in rendering its said service, (3) in any city, town, borough, township, village or other place in the United States in which the company is then engaged in rendering its said service, or (4) in any city, town, borough, township or village in the United States in which the Company has been or has signified its intentions to be engaged in rendering its said service.

In October 1985, plaintiff terminated defendant's employment. Defendant held the position of project manager when his employment with plaintiff was terminated. On 1 November 1985, defendant was employed by HEPACO, an asbestos abatement contractor located in Charlotte, North Carolina. Defendant worked on one asbestos cleaning contract for HEPACO. On 8 November 1985, plaintiff filed its complaint and motion for a preliminary injunction against defendant. Plaintiff averred, *inter alia*, that it was entitled to a preliminary injunction and permanent injunction issued to defendant specifically enforcing the express terms of the parties' agreement and prohibiting defendant from using the skill, education and experience acquired through employment by plaintiff for the benefit of himself or another. A hearing was held upon plaintiff's motion on 2 December 1985. On 5 December 1985, the court entered an order granting plaintiff's motion for a preliminary injunction. Defendant was enjoined for one year or until trial from competing with plaintiff through the use of knowledge acquired during his employment with plaintiff. The court specifically restrained defendant from any employment on projects that are bid or negotiated between plaintiff and defendant's present employer or successor employer within North Carolina, South Carolina, Virginia, Georgia, and Alabama. Defendant appeals.

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Masterclean of North Carolina v. Guy

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*Molitoris & Connolly, by Anne Connolly and Theodore M. Molitoris, for plaintiff appellee.*

*Smith, Patterson, Follin, Curtis, James & Harkavy, by Marion G. Follin, III, for defendant appellant.*

JOHNSON, Judge.

[1] Our first line of inquiry is whether the preliminary injunction entered by the trial court against defendant deprives defendant of a substantial right which he would lose absent a review prior to a final determination on the merits of this case. In *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 302 S.E. 2d 754 (1983), the Supreme Court of North Carolina stated the following:

A preliminary injunction is interlocutory in nature, issued after notice and hearing, which restrains a party pending final determination on the merits. Pursuant to G.S. 1-277 and G.S. 7A-27, no appeal lies to an appellate court from an interlocutory order or ruling of a trial judge unless such order or ruling deprives the appellant of a substantial right which he would lose absent a review prior to final determination.

*McClure*, at 400, 302 S.E. 2d at 759 (citations omitted). We hold that defendant would be deprived of a substantial right, absent a review prior to a final determination, to wit: the right to work and earn a living in the states of North Carolina, South Carolina, Virginia, Georgia, and Alabama. See generally *Robins R. Weill Inc. v. Mason*, 70 N.C. App. 537, 320 S.E. 2d 693, cert. denied, 312 N.C. 495, 322 S.E. 2d 559 (1984). Testimony established that there are only two prospective employers other than plaintiff engaged in the business of asbestos abatement in the state of North Carolina. As an appellate court we are "not bound by the findings, but may review and weigh the evidence and find facts" for ourselves. *McClure*, supra, at 402, 302 S.E. 2d at 760. "A preliminary injunction, as a general rule, will be issued only '(1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.'" *Mason*, supra, at 540-41, 320 S.E. 2d at 696, quoting, *Investors Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E. 2d 566, 574 (1977) (emphasis in original). In order for a covenant not to compete to

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Masterclean of North Carolina v. Guy

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be held as valid and enforceable there must be a showing that it is the following:

1. In writing.
2. Made part of a contract of employment.
3. Based on reasonable consideration.
4. Reasonable both as to time and territory.
5. Not against public policy.

*McClure, supra*, at 402-03, 302 S.E. 2d at 760.

[2] Defendant's first argument is that the preliminary injunction should be vacated because plaintiff failed to show a likelihood of success on the merits. The basis for defendant's argument is that clauses two (2), three (3), and four (4) of the covenant not to compete are unenforceable because they are not reasonable as to territory. Defendant compares the subject covenant not to compete with the covenant not to compete scrutinized in the case of *Welcome Wagon International Inc. v. Pender*, 255 N.C. 244, 120 S.E. 2d 739 (1961). That covenant not to compete was as follows:

NOW, THEREFORE, for and in consideration of this employment, and the compensation to be earned and paid to the Hostess hereunder, said Hostess covenants and agrees that she will not during the term of this employment, and for a period of five whole years thereafter, engage directly or indirectly for herself or as an agent, representative or employee of others, in the same kind or similar business as that engaged in by the company (1) in Fayetteville, North Carolina, or (2) in any other city, town, borough, township, village or other place in the State of North Carolina in which the company is then engaged in rendering its said service, or (3) in any city, town, borough, township, village or other place in the United States in which the Company is then engaged in rendering its said service, or (4) in any city, town, borough, township or village in the United States in which the company has been or has signified its intention to be, engaged in rendering its said service.

*Pender, supra*, at 246, 120 S.E. 2d at 740. The covenant not to compete considered in *Pender, supra*, is strikingly similar to the



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Masterclean of North Carolina v. Guy

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covenant the parties entered into in the case *sub judice*. If restriction one (1) in the covenant in the case *sub judice* stated Fayetteville, North Carolina instead of Forsyth County, North Carolina, the covenants would be virtually identical. However, there are some factual circumstances in the case *sub judice* which are distinguishable from *Pender, supra*. In *Pender, supra*, defendant was employed by plaintiff as a hostess whose responsibility was to procure a sufficient number of sponsors to ensure the program's success. Plaintiff was a Delaware Corporation in the advertising business, which employed hostesses to contact prospective customers for local merchants and enhance said merchant's good will among newcomers to the local market. Plaintiff in *Pender, supra*, operated in approximately 1,200 cities and employed 3,500 hostesses. The Court in *Pender, supra*, stated the following:

The court is without power to vary or reform the contract by reducing either the territory or the time covered by the restrictions. *However, where, as here, the parties have made divisions of the territory, a court of equity will take notice of the divisions the parties themselves have made, and enforce the restrictions in the territorial divisions deemed reasonable and refuse to enforce them in the divisions deemed unreasonable.* It is patent that division (1)—Fayetteville—is not unreasonable. Likewise it appears that divisions (3) and (4)—any city or town in the United States in which the plaintiff is doing or intends to do business—are unreasonable and will not be enforced. Whether (2) is reasonable is for the chancellor.

*Pender, supra*, at 248, 120 S.E. 2d at 742. (Emphasis supplied.) We note that three Justices dissented to the majority opinion in *Pender, supra*. The majority in *Pender, supra*, in upholding the five year time period of the covenant, did not follow *Welcome Wagon International Inc. v. Morris*, 224 F. 2d 693 (4th Cir. 1955), for the stated reason "that decision does not follow the general rule and is not based on sounder reasoning." *Pender, supra*, at 249, 120 S.E. 2d at 742. Quoting 9 A.L.R., p. 1468, the Court in *Pender, supra*, stated the general rule as follows:

It is clear that if the nature of the employment is such as will bring the employee in personal contact with patrons or cus-

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**Masterclean of North Carolina v. Guy**

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tomers of the employer or enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patron or customers, enabling him by engaging in a competing business in his own behalf or for another, to take advantage of such knowledge of or acquaintance with the patrons and customers of his former employer, and thereby gain an unfair advantage, equity will interpose in behalf of the employer and restrain the breach . . . providing the covenant does not offend against the rule that as to time . . . or as to the territory it embraces it shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer.

*Pender, supra*, at 249, 120 S.E. 2d at 742 (emphasis supplied). This Court has stated the following:

[T]he restraint is unreasonable and void if it is greater than is required for the protection of the promisee or if it imposes an undue hardship upon the person who is restricted. Owing to the possibility that a person may be deprived of his livelihood, the courts are less disposed to uphold restraints in contracts of employment than to uphold them in contracts of sale.

*Wilmar, Inc. v. Liles*, 13 N.C. App. 71, 75, 185 S.E. 2d 278, 281 (1971), *quoting with approval, Little Rock T. & L. Sup. Co. v. Independent L. Serv. Co.*, 237 Ark. 877, 377 S.W. 2d 34 (1964).

In the case *sub judice*, plaintiff's only witness Mr. Smith, the president of the plaintiff corporation, did not testify sufficiently to establish a need for the protection of plaintiff to the extent the covenant places territorial restrictions upon defendant. According to Mr. Smith's testimony, the only states plaintiff had engaged in the business of asbestos abatement since 1979 were Tennessee (one job "a year and a half or two years ago"), Indiana (one job), Mississippi (one job), Georgia ("would say a dozen"), North Carolina ("probably 50") and South Carolina ("perhaps 20"). There was no testimony with respect to the number of contracts performed in Virginia. There was no testimony with respect to the number of contracts performed in Forsyth County. Such testimony does not establish the need for plaintiff's protection by way of a restrictive covenant that embraces the entire United States. Clauses (3) and (4) are patently unreasonable. The trial court

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Masterclean of North Carolina v. Guy

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sought to enforce clause (3) by reducing the territorial restriction embracing the United States to five (5) states. This is not the "divisions of the territory" relied upon in *Pender, supra*, at 248, 120 S.E. 2d at 742. The divisions referred to in *Pender, supra*, were the four enumerated divisions in the covenant not to compete; for example "divisions (3) and (4)—any city or town in the United States in which the plaintiff is doing, or intends to do business—are unreasonable and will not be enforced." *Id.* (emphasis supplied). We hold that the divisions three (3) and four (4) in the case *sub judice* are likewise unreasonable and the court was without the power to vary or reform the contract by reducing territory. *Pender, supra*, at 248, 120 S.E. 2d at 742. It was unlikely that plaintiff would succeed on the merits of this case and plaintiff was not entitled to have a preliminary injunction issued to defendant.

[3] Defendant next argues that plaintiff failed to show a reasonable apprehension of irreparable injury unless the injunction is granted. We agree.

To establish a reasonable apprehension of irreparable injury in a case such as this the plaintiff must establish that the likelihood of disclosure of the information is high. In making these determinations courts weigh several factors, among them the circumstances surrounding the termination of employment, the importance of the employee's job, the type of work performed by the employee, the kind of information sought to be protected, and the need of the competitor for the information.

*Travenol Laboratories Inc. v. Turner*, 30 N.C. App. 686, 692, 228 S.E. 2d 478, 483 (1976). In *Turner*, plaintiff sought injunctive relief in three separate ways (1) to prevent defendant in *Turner, supra*, from working for a competitor as a means of enforcing the duty not to disclose confidential information; (2) to prevent defendant from disclosing "all information regarded as confidential," including modification of a westfalia centrifuge; and (3) to prevent defendant from disclosing any written trade secrets or confidential information. *Id.* at 692-93, 228 S.E. 2d at 484. This Court stated:

North Carolina courts have never enjoined an employee from working for a competitor merely to prevent disclosure of con-

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**Masterclean of North Carolina v. Guy**

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fidential information. Courts in other jurisdictions have granted such injunctive relief very infrequently in special circumstances not present here. In each case the employee had specialized technical training and was involved in research and development. There were circumstances of bad faith or underhanded dealing and the competitor lacked comparable level of technical knowledge and achievement.

*Turner, supra*, at 693, 228 S.E. 2d at 484.

In the case *sub judice*, Mr. Smith testified to the effect that plaintiff terminated defendant's employment; that the vast majority of defendant's work (90%) was the actual removal of asbestos and only a small percentage of defendant's time was spent in customer contacts such as pre-bid conferences; that plaintiff had trained foremen in operating procedures that were not secret but were considered unique; that plaintiff utilized unique safety procedures and a storage tank for oxygen that was unique, but not patented; and that competitors could observe many of the procedures utilized by plaintiff. There was also testimony by defendant that there are schools such as Georgia Technical Institute which he attended to learn about how to remove asbestos from buildings; that the EPA, the U.S. Department of Commerce and National Installation Contractors, as well as private individuals, publish manuals pertaining to asbestos removal; that he had used procedures suggested by the manuals; that companies in the business of asbestos removal basically use the same type of equipment; and that competitors would visit each other's job sites. We hold that the facts and circumstances of this case do not dictate injunctive relief and that the scope of the injunction is so broad that defendant is deprived of a realistic opportunity to use his own skill and talents. *Turner, supra*, at 694, 228 S.E. 2d at 485.

Vacated.

Judges WEBB and WHICHARD concur.

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**Brisson v. Williams**

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**BRENDA WILLIAMS BRISSON AND R. FRANKLIN WILLIAMS v. ANNIE HILL WILLIAMS**

No. 8616SC36

(Filed 15 July 1986)

**1. Trusts § 14.2—constructive trust—breach of confidential relationship of husband and wife**

Plaintiffs' forecast of evidence presented a genuine issue of material fact as to whether defendant committed constructive fraud based on breach of a confidential relationship of husband and wife entitling plaintiffs to the impression of a constructive trust on property conveyed by plaintiffs' father to himself and defendant, his wife, as tenants by the entirety on 1 November 1960 where plaintiffs presented evidence tending to show that at the time of the conveyance plaintiffs' father and defendant entered a contract providing that, should the father predecease defendant, defendant would hold the lands in fee simple but that any of the lands remaining at defendant's death would be divided equally among plaintiffs and defendant's son; the father died in 1966; the father had indicated to plaintiffs and others that he had fixed it so that plaintiffs would inherit the subject property after his death; plaintiffs' father was a chronic alcoholic who was rarely sober between 1957 and his death in 1966 and lacked the capacity to manage his business affairs from about 1960 onward; defendant, instead of plaintiffs' father, managed all of the family's affairs; and defendant was mean to plaintiffs' father, was actually violent with him at times, and apparently wanted everything that he had.

**2. Trusts § 13—undue influence—resulting trust unavailable**

A resulting trust was unavailable to plaintiffs where their evidence tended to show undue influence by defendant.

**3. Trusts § 15—constructive trusts—statute of limitations**

Constructive trusts are governed by the ten-year statute of limitations in N.C.G.S. § 1-56.

**4. Trusts § 15—constructive trust—beginning of statute of limitations—issue of material fact**

A genuine issue of material fact was presented as to when plaintiffs had noticed that defendant was claiming the subject property adversely to them so as to commence the running of the statute of limitations against their claim for impression of a constructive trust on the property where defendant contended that the statute began running when she took possession of the lands in 1966 following the death of plaintiffs' father, and where plaintiffs contended that they believed defendant held only a life estate in the property with plaintiffs retaining a remainder interest that would vest upon defendant's death, that defendant's open, continuous and exclusive possession of the land after the death of plaintiffs' father would not have appeared adverse to plaintiffs, and that the statute of limitations was tolled until they learned in January 1984 that defendant intended to sell the property.

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**Brisson v. Williams**

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APPEAL by plaintiffs from *McLelland, Judge*. Order entered 15 April 1985 in Superior Court, ROBESON County. Heard in the Court of Appeals 3 June 1986.

Defendant married Rembert Williams on or about 23 December 1956. On 1 November 1960 Williams executed a warranty deed to himself and defendant conveying four tracts of real estate in Robeson County which Williams had theretofore owned individually. The deed recited that: "The purpose and intent of this conveyance is to create a tenancy by the entireties in and to the said Rembert Williams and wife, Annie Hill Williams." The deed was recorded on 1 November 1960.

Defendant and Williams also entered a contract on 1 November 1960 which provided in pertinent part:

That whereas by deed made and executed this date, the said Rembert Williams has conveyed four tracts of land . . . to himself and his said wife, Annie Hill Williams, as tenants by the entireties; and whereas, each of the parties hereto have children by former marriages; and whereas, the parties hereto desire that all of said children share in said lands after the deaths of both of said parties hereto;

NOW, THEREFORE, said parties, for and in consideration of the conveyance hereinabove referred to and other good and valuable considerations moving between said parties, do hereby contract and agree as follows:

1. That in the event the said Rembert Williams predeceases his said wife, Annie Hill Williams, that the said Annie Hill Williams will hold said lands in fee simple and be free to convey, mortgage or encumber same as she sees fit, but any of said lands remaining at the time of her death shall be divided equally between [defendant's son and Williams' son and daughter]. And, in the event the said Annie Hill Williams predeceases the said Rembert Williams, then and in that event, the said Rembert Williams shall own said lands in fee simple with complete right to convey, mortgage or encumber said lands, but all lands remaining at the death of the said Rembert Williams shall be divided equally between [defendant's son and Williams' son and daughter].

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**Brisson v. Williams**

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Williams died in January 1966. The contract was thereafter recorded on 31 January 1966 in the Robeson County Register of Deeds Office. Defendant has remained in open, continuous and exclusive possession and control of the subject property since Williams' death.

Plaintiffs are the children of Williams by a former marriage, and they are citizens and residents of South Carolina. Plaintiff Brisson learned that defendant intended to sell the subject property in January 1984 when she attended a wedding in Robeson County and saw an auction sign posted on the land. Plaintiffs brought this action on 17 February 1984 seeking, *inter alia*, a declaration that they are "owners of an interest in the real estate described in said deed by reason and establishment of . . ." either a constructive or resulting trust. Defendant raised the statute of limitations as a defense in its answer.

The court granted defendant's motion for summary judgment. Plaintiffs appeal.

*Lee and Lee, by W. Osborne Lee, Jr. and J. Stanley Carmical, for plaintiff appellants.*

*Floyd & Floyd, P.A., by R. F. Floyd, Jr., for defendant appellee.*

WHICHARD, Judge.

The sole question is whether the court erred in granting defendant's motion for summary judgment. Under N.C. Gen. Stat. 1A-1, Rule 56, defendant is entitled to summary judgment if the record shows "that there is no genuine issue as to any material fact and that [defendant] is entitled to a judgment as a matter of law." "In ruling on a motion for summary judgment the evidence is viewed in the light most favorable to the non-moving party." *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E. 2d 266 (1986).

Plaintiffs contend that they have forecast evidence sufficient to establish either a constructive or a resulting trust. Defendant contends that the statute of limitations bars plaintiffs' claim. We hold that the forecast of evidence presents the following genuine issues of material fact: (1) whether defendant has committed constructive fraud entitling plaintiffs to impression of a constructive trust; and (2) if so, when did plaintiffs have notice that defendant

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**Brisson v. Williams**

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was claiming the subject property adversely to them so as to commence the running of the statute of limitations. Accordingly, we reverse.

Plaintiffs' complaint alleged, in pertinent part, that: Williams experienced severe chronic alcoholism prior to and during his marriage to defendant and his alcoholism compelled hospitalization and medical treatment on several occasions. By virtue of this alcoholism Williams lacked the requisite mental capacity on 1 November 1960 to have validly executed the deed and contract regarding the subject property. Defendant fraudulently induced Williams to execute these instruments by fraudulently representing to him "that he was signing documents other than documents affecting the real estate owned by [him] or some other, similar fraudulent representation." Defendant, by this fraud or constructive fraud, abused the relationship of trust and confidence between herself and Williams. On numerous occasions after 1 November 1960 Williams informed plaintiffs and others that he "had ensured that, after his death, [plaintiffs] would have an interest in the real property that [he] owned and [plaintiffs] would thus be provided for." Defendant wrongfully interfered with Williams' intent to provide plaintiffs with an interest in the subject property by compelling him to sign the deed and contract on 1 November 1960.

Plaintiffs filed several affidavits in support of these allegations. Plaintiff Brisson states in her affidavit that her father "had always told [her] after his remarriage that he had left his land to [her] brother and [herself] . . ." and that she "had expected to get some land when [defendant] dies . . . ."

Viva Ashley, who was employed by Southern National Bank in Fairmont, North Carolina in 1963, states that Williams entered her bank sometime in 1963 and told her "'that I am going to fix the land so Brenda and Franklin will have it when I am gone.'" Williams returned to the bank on the same afternoon he made the foregoing statement and said "'I have fixed it so Brenda and Franklin will have the land together.'"

Williams' brother, Crofton, states that Williams had a drinking problem which required treatment as early as 1952. After 1957 Williams was rarely sober and usually was drunk by lunch; his drinking worsened during the years prior to his death.



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Brisson v. Williams

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Williams lacked the capacity to manage his business affairs from about 1960 until his death. Defendant handled all the family business. On one occasion Williams told Crofton that "he had looked after making sure that Brenda and Frank got the land after he died."

Lucy Godfrey states that Williams, her half-brother, was easy to persuade. She further states that Williams and defendant had a very violent relationship. On one occasion she heard defendant say "'I tried to knock him down when he came in the other night . . . [,]' " and on another occasion she heard her say "'I tried to bust him open the other night.' "

R. C. Faulk states that Williams was one of his best friends since their school days. Williams told him that defendant would always threaten him unless he would do what she said to do and that he was forced to do whatever defendant wanted.

Earl Bullock, one of Williams' neighbors, states that Williams told him that defendant "wanted everything that he had." Billy E. Hunt, who also knew Williams, states that defendant was always mean to Williams. Hunt bought Williams cigarettes because defendant kept all the money and did not give Williams enough money to buy anything. When Williams would come home, defendant "would never try to get him out of the car and would leave him all day and all night drunk. [Defendant] also kept [Williams'] heart medicine away from him."

In general,

[t]wo classes of trusts arise by operation of law; resulting trusts and constructive trusts. "[T]he creation of a resulting trust involves the application of the doctrine that valuable consideration rather than legal title determines the equitable title resulting from a transaction; whereas a constructive trust ordinarily arises out of the existence of fraud, actual or presumptive—usually involving the violation of a confidential or fiduciary relation—in view of which equity transfers the beneficial title to some person other than the holder of the legal title." [Citations omitted.]

*Leatherman v. Leatherman*, 297 N.C. 618, 621-22, 256 S.E. 2d 793, 795-96 (1979). "[A] resulting trust involves a presumption or supposition of law of an intention to create a trust; whereas a con-

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**Brisson v. Williams**

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structive trust arises independent of any actual or presumed intention of the parties and is usually imposed contrary to the actual intention of the trustee." *Bowen v. Darden*, 241 N.C. 11, 14, 84 S.E. 2d 289, 292 (1954). See also *Lewis v. Boling*, 42 N.C. App. 597, 605, 257 S.E. 2d 486, 491-92 (1979). See, generally, Bogert, *The Law of Trusts and Trustees* Sec. 451 (Rev. 2d Ed., 1977).

In *Link v. Link*, 278 N.C. 181, 185, 179 S.E. 2d 697, 699 (1971), plaintiff-wife sought to have an assignment of stock by her to defendant-husband declared void. The Court stated:

Where a transferee of property stands in a confidential or fiduciary relationship to the transferor, it is the duty of the transferee to exercise the utmost good faith in the transaction and to disclose to the transferor all material facts relating thereto and his failure to do so constitutes fraud. *Vail v. Vail*, 233 N.C. 109, 63 S.E. 2d 202. Such a relationship "exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896. Intent to deceive is not an essential element of such constructive fraud. *Miller v. Bank*, 234 N.C. 309, 67 S.E. 2d 362. Any transaction between persons so situated is "watched with extreme jealousy and solicitude; and if there is found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party." *Rhodes v. Jones*, 232 N.C. 547, 61 S.E. 2d 725.

As Justice Sharp said in *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E. 2d 562, "The relationship between husband and wife is the most confidential of all relationships, and transactions between them, to be valid, must be fair and reasonable."

*Link*, 278 N.C. at 192-93, 179 S.E. 2d at 704. In *Rhodes*, cited by the *Link* court, the Court held that a plaintiff bringing an action for constructive fraud based on breach of a confidential or fiduciary relationship must "allege the facts and circumstances (1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of the plaintiff." *Rhodes*, 232 N.C. at 549, 61 S.E.

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Brisson v. Williams

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2d at 726. *See also Terry v. Terry*, 302 N.C. 77, 83, 273 S.E. 2d 674, 677 (1981) (constructive fraud arises in circumstances where a confidential relationship exists and the *Rhodes* elements are satisfied).

The forecast of evidence here shows that Williams was a chronic alcoholic who was rarely sober between 1957 and his death in 1966. Williams lacked the capacity to manage his business affairs from about 1960 onward. Defendant, instead of Williams, managed all of the family's affairs. Defendant was mean to Williams and actually violent with him at times; she also apparently wanted everything that her husband had. Williams indicated to plaintiffs and others that plaintiffs would inherit the subject property after his death.

[1] We hold that a court, viewing the foregoing evidence in the light most favorable to plaintiffs, could not properly conclude as a matter of law that plaintiffs have not shown "the slightest trace of undue influence or unfair advantage . . ." by defendant in the 1 November 1960 transaction. *Link, supra*, 278 N.C. at 192, 179 S.E. 2d at 704. Plaintiffs have alleged and established sufficient facts and circumstances to satisfy the *Rhodes* requirements for maintaining an action for constructive fraud based on breach of a confidential relationship. If defendant has committed constructive fraud, based on breach of the confidential relationship of husband and wife, plaintiffs will be entitled to have a constructive trust impressed upon the subject property. *See Leatherman, supra*, 297 N.C. at 621-22, 256 S.E. 2d at 795-96. Accordingly, we hold that the forecast of evidence presents a genuine issue of material fact as to whether plaintiffs are entitled to have a constructive trust impressed upon the subject property.

[2] Unlike the facts in *Cline v. Cline*, 297 N.C. 336, 255 S.E. 2d 399 (1979), however, the facts here do not also give rise to a resulting trust. In *Cline* plaintiff-wife furnished consideration for property deeded to defendant-husband alone when she had been assured previously that she and her husband would own the subject property jointly after they had paid off the mortgage. By contrast, the furnishing of consideration is not at issue here. Plaintiffs' contention that defendant "interfered with Williams'

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**Brisson v. Williams**

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... intent to devise property to his children ...” suggests undue influence by defendant. Undue influence underlies constructive fraud and would entitle plaintiffs to impression of a constructive trust, not a resulting trust. We thus hold that a resulting trust is not available to plaintiffs.

Defendant contends that N.C. Gen. Stat. 1-56, the ten-year “catch-all” section, bars plaintiffs’ claim. We disagree.

[3] Constructive trusts, as distinguished from express trusts, are governed by the ten-year statute of limitations in N.C. Gen. Stat. 1-56. *Cline, supra*, 297 N.C. at 348, 255 S.E. 2d at 406. When the statute of limitations is properly pleaded, the burden of proof is on the party against whom the statute is pleaded to show that the claim is not barred. *Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 316, 101 S.E. 2d 8, 13 (1957). Generally, the bar of the statute of limitations is a mixed question of law and fact. *Id.* at 317, 101 S.E. 2d at 13. “[W]here it clearly appears that plaintiff’s claim is barred by the running of the statute of limitations, defendant is entitled to judgment as a matter of law, and summary judgment is appropriate.” *Poston v. Morgan-Schultheiss, Inc.*, 46 N.C. App. 321, 323, 265 S.E. 2d 615, 616, *cert. denied*, 301 N.C. 95 (1980).

[4] The issue is when the statute of limitations began to run against plaintiffs’ claim for enforcement of a constructive trust on the subject property. Plaintiffs contend the statute of limitations was tolled until they learned in January 1984 that defendant intended to sell the subject property. Defendant contends the statute began running when she took possession of the lands in 1966 following Williams’ death. She argues that plaintiffs knew or should have known that defendant’s open, continuous and exclusive possession was adverse to any claim by plaintiffs. This contention ordinarily would be correct unless plaintiffs believed defendant was claiming a life estate instead of a fee simple interest in the land.

In this regard plaintiff Brisson states: “I had expected to get some land when [defendant] dies, so my brother and I were willing to wait things out ...” This assertion, which is uncontroverted, suggests that plaintiffs may have believed that defendant held a life estate in the subject property with plaintiffs retaining a remainder interest that would vest upon defendant’s death. As a life tenant, defendant’s open, continuous and ex-

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Allen v. Pullen

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clusive possession of the land after Williams' death in 1966 would not have appeared adverse to plaintiffs, and, standing alone, would have been insufficient to place plaintiffs on notice that she was asserting an adverse claim for purposes of the statute of limitations. *Howell v. Alexander*, 3 N.C. App. 371, 381, 165 S.E. 2d 256, 264 (1969). Further, recordation of the 1 November 1960 deed and contract does not constitute notice to plaintiffs as a matter of law since they "had no cause to be and were not parties to the transaction." *Id.* We thus hold that the forecast of evidence also presents a genuine issue of material fact as to when plaintiffs had notice that defendant was claiming the subject property adversely to them so as to commence the running of the statute of limitations.

For the foregoing reasons, the order is reversed, and the cause is remanded for further proceeding on the issues presented.

Reversed and remanded.

Judges WEBB and JOHNSON concur.

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MELVIN RAY ALLEN v. TERRI KNOPF PULLEN v. LOWE'S PLUMBING  
COMPANY, INC.

No. 8618SC134

(Filed 15 July 1986)

**Automobiles and Other Vehicles § 88—colliding with tractor-sweeper—reduced  
visibility from dust—contributory negligence**

Although the evidence would permit the jury to find that defendant was contributorily negligent in failing to stop when confronted with reduced visibility resulting from dust created by a tractor-sweeper operated by plaintiff at a construction site, in driving at a speed greater than reasonable and prudent under the circumstances, and in failing to keep a proper lookout, the evidence failed to establish contributory negligence by defendant as a matter of law in colliding with the tractor-sweeper where it tended to show that the dust did not at first appear to defendant to be any thicker than dust which she had seen created by other automobiles passing through the construction area; defendant knew that another motorist had just driven through the construction area; defendant knew that flagmen were posted when work was in progress and that work had usually ceased by the time she drove through the area in the afternoon, but there were no flagmen on the occasion of the accident to

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Allen v. Pullen

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indicate that work was still in progress; defendant decreased her speed from the time she first observed the dust until she reached it; and when defendant became aware that the dust was thicker than she at first had thought, the collision occurred before she could apply her brakes.

APPEAL by defendant from *Collier, Judge*. Judgment entered 26 August 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 4 June 1986.

On 15 June 1984, a tractor-sweeper operated by plaintiff, Melvin Ray Allen, and owned by his employer, Lowe's Plumbing Company, Inc. (Lowe's), was involved in a collision with an automobile driven by defendant, Terri Knopf Pullen. The accident occurred at a construction site where Lowe's was installing a sewer line along the southern edge of Brown Street Extension in Davidson County, just outside Lexington, N. C. Both Melvin Ray Allen and Terri Knopf Pullen sustained personal injuries.

On 26 July 1984, Melvin Ray Allen brought this action for damages against defendant, alleging that she had been negligent, in specified particulars, in the operation of her automobile and that her negligence was a proximate cause of the collision and of his injuries. In her answer, defendant denied negligence on her part and asserted a counterclaim against plaintiff and a third party complaint against Lowe's, alleging that she had been injured by their negligence and seeking damages. Lowe's filed answer, denying defendant's allegations and asserting a counterclaim against her for damages to its tractor-sweeper.

At the close of defendant's evidence, and at the close of all of the evidence, plaintiff, Melvin Ray Allen, and the third party defendant, Lowe's, each moved for a directed verdict, pursuant to G.S. 1A-1, Rule 50(a), in his or its favor on defendant's counterclaim and third party claim. The motions were denied. The following issues were submitted to the jury and answered as indicated:

1. Was the plaintiff, Melvin Ray Allen, injured by the negligence of the defendant, Terri Knopf Pullen?

ANSWER: No

2. Did the plaintiff, Melvin Ray Allen, by his own negligence, contribute to his injury?

ANSWER: \_\_\_\_

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Allen v. Pullen

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3. Did the defendant, Terri Knopf Pullen, have the last clear chance to avoid the plaintiff, Melvin Ray Allen's, injury?

ANSWER: \_\_\_\_

4. What amount, if any, is the plaintiff, Melvin Ray Allen, entitled to recover for personal injury?

ANSWER: \$ \_\_\_\_

5. Was the defendant, Terry Knopf Pullen, injured by the negligence of the plaintiff, Melvin Ray Allen?

ANSWER: Yes

6. Was the defendant, Terri Knopf Pullen, injured by the negligence of the third-party defendant, Lowe's Plumbing Company, Incorporated?

ANSWER: Yes

7. What amount, if any, is the defendant, Terri Knopf Pullen, entitled to recover for personal injuries?

ANSWER: \$280,000.00

8. Did the negligence of Lowe's Plumbing Company, Incorporated, join and concur with the negligence of the defendant, Terri Knopf Pullen?

ANSWER: \_\_\_\_

9. What amount, if any, is the third-party defendant, Lowe's Plumbing Company, Incorporated, entitled to recover for property damage?

ANSWER: \$ \_\_\_\_

Both plaintiff and Lowe's moved, pursuant to G.S. 1A-1, Rule 50(b), for judgment notwithstanding the verdict and, alternatively, for a new trial. The trial court set aside the jury's verdict as to the first issue and entered judgment notwithstanding the verdict, finding that defendant was contributorily negligent as a matter of law with respect to her counterclaim against plaintiff and her third party claim against Lowe's. The jury's verdict finding negligence on the part of plaintiff and on the part of Lowe's was

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Allen v. Pullen

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not disturbed. The motion for a new trial was denied, and judgment was entered dismissing all claims with prejudice. Only defendant, Terri Knopf Pullen appeals.

*Smith, Helms, Mulliss & Moore, by Peter J. Covington and Rolly L. Chambers; and Schoch, Schoch and Schoch, by Arch Schoch, Jr., for plaintiff and third party defendant-appellees.*

*Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter and Tyrus V. Dahl, Jr.; and Wyatt, Early, Harris, Wheeler & Hauser, by Frank B. Wyatt, for defendant and third party plaintiff-appellant.*

MARTIN, Judge.

The sole issue on appeal is whether the trial court erred when it granted judgment notwithstanding the verdict in favor of plaintiff and Lowe's, finding, as a matter of law, that defendant's counterclaim and third party claim were barred by her contributory negligence. For the reasons which follow, we reverse.

A motion for judgment notwithstanding the verdict, made pursuant to G.S. 1A-1, Rule 50(b), is a request that judgment be entered in accordance with the movant's previous motion for a directed verdict, despite the contrary verdict of the jury. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). Hence, the same rules by which the sufficiency of the evidence is tested upon motion for a directed verdict pursuant to G.S. 1A-1, Rule 50(a), apply to the determination of a motion for judgment notwithstanding the verdict. *Id.* All of the evidence which supports the non-movant's claim must be viewed as true and must be considered in the light most favorable to the non-movant, giving that party the benefit of all reasonable inferences which may be legitimately drawn from the evidence and resolving all conflicts and inconsistencies in the non-movant's favor. *Bryant v. Nationwide Mutual Fire Ins. Co.*, 313 N.C. 362, 329 S.E. 2d 333 (1985). The motion may be granted only when the evidence, when so considered, is insufficient as a matter of law to support a verdict for the non-movant. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974).

It is well established that a claim will be barred by the doctrine of contributory negligence when a claimant fails to exercise ordinary care for his or her own safety, and such failure, concur-



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Allen v. Pullen

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ring with the actionable negligence of the other party, against whom the claim is made, contributes to the claimant's injury. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E. 2d 504 (1980). The existence of contributory negligence does not depend on the claimant's subjective appreciation of the hazard; the standard of ordinary care is an objective one—"the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury." *Id.* at 673, 268 S.E. 2d at 507 (quoting *Clark v. Roberts*, 263 N.C. 336, 343, 139 S.E. 2d 593, 597 (1965). Where, as in the present case, a motion for judgment notwithstanding the verdict is grounded upon the claimant's contributory negligence as a matter of law

The question before the trial court is whether 'the evidence taken in the light most favorable to [the claimant] establishes her negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Contradictions or discrepancies in the evidence even when arising from [claimant's] evidence must be resolved by the jury rather than the trial judge.' [Citations omitted.]

*Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 468-9, 279 S.E. 2d 559, 563 (1981). Thus, the pivotal question is whether the evidence, when viewed in the light most favorable to Mrs. Pullen, permits no other reasonable inference except that she failed to exercise such care for her own safety as a reasonably careful and prudent person would have used under similar circumstances.

The evidence, so viewed, tended to show that for approximately a month prior to 15 June 1984, Lowe's Plumbing Co., Inc. had been engaged in constructing a sewer main along the south side of Brown Street Extension. Plaintiff, Melvin Ray Allen, was employed by Lowe's as foreman. The work required that a ditch be dug parallel to the roadway approximately four feet from the edge of the pavement. The dirt from the ditch was piled on the pavement in the eastbound lane of the road. As the pipe was laid, the dirt would be pushed back into the ditch. Due to this work, the eastbound lane in the vicinity of the work was closed during the day, and signs and flagmen were posted at each end of the project. At the end of each workday, the dirt remaining on the roadway was swept off the road with a tractor-sweeper. Because the sweeping operation involved both lanes of travel and created

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Allen v. Pullen

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thick dust, the flagmen were supposed to stop all traffic approaching the site from either direction until the sweeping was completed and the dust had cleared sufficiently to permit visibility.

Defendant, Terri Knopf Pullen, was employed at Henry Link Furniture Company and traveled on Brown Street Extension daily on her way to and from her work. She was aware of the construction and had observed flagmen at the project. She also testified that when she had driven through the area, and had followed other vehicles through the area, she had observed that the vehicles would create clouds of dust. When she left work at approximately 5 o'clock each afternoon, the construction work had usually been completed for the day, and she had never seen the tractor-sweeper in operation.

On 15 June 1984, Mrs. Pullen left work at 5:00 p.m. to go to a day care center to pick up her son. Luann Smith, a co-worker who was also going to the day care center, drove out of the parking lot "a little bit ahead" of defendant. When defendant reached Brown Street Extension, she could no longer see Luann Smith's car due to a curve in the road. After a short distance she saw a sign indicating "Flagman Ahead." As she rounded the curve, traveling forty to forty-five miles per hour, she saw a large cloud of dust approximately 1,500 feet ahead of her in the vicinity of the construction site. She took her foot off the accelerator and reduced her speed. She testified that she saw no flagman and thought, therefore, that there was no danger and that the dust had been created by Luann Smith's car. In actuality, the dust cloud had been created by plaintiff's operation of the tractor-sweeper, clearing away the dirt which had accumulated on the roadway during the day's construction. Plaintiff was in the east-bound lane, the same lane in which defendant was traveling, and had created a cloud of dust behind the tractor-sweeper sufficiently thick that he was able to see only about 15 feet behind him. There was no flagman stopping eastbound traffic during the sweeping operation.

Defendant testified that as she approached the dust cloud, it was moving towards her "like a wall." When she entered it, "it was light, and then, instantly, it was just real thick." She was in the dust "a fraction of a second" before the collision; she did not

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Allen v. Pullen

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have her foot on the accelerator, but had no time to apply her brakes. She did not see the tractor until the instant she collided with it.

Plaintiff and Lowe's contend that Mrs. Pullen was contributorily negligent as a matter of law by failing to stop when confronted with the reduced visibility resulting from the dust created by the sweeper, by driving at a speed greater than reasonable and prudent under the circumstances, and by failing to keep a proper lookout. While we agree that the evidence permits reasonable inferences to be drawn that she was negligent in each of these respects, these are not the only inferences which may be drawn from the evidence.

The evidence with respect to Mrs. Pullen's speed was conflicting, but considered most favorably to her permits the inference that she decreased speed from the time she first observed the dust until she reached it. Her testimony was that she coasted, and upon first realizing how thick the dust had become, she "went to apply on brakes," but struck the tractor-sweeper before she could do so. Her failure to stop her vehicle within the range of her vision is not contributory negligence *per se*, G.S. 20-141(n), and under the circumstances of this case where her vision was suddenly obscured, the question of her speed was properly one for the jury.

The question of whether a motorist is contributorily negligent as a matter of law by proceeding when his or her vision becomes obscured by conditions on the highway has been addressed by our appellate courts on several occasions, with mixed results. See *White v. Mote*, 270 N.C. 544, 155 S.E. 2d 75 (1967) (motorist proceeded into fog created by insecticide fogging machine and collided with rear of the fogging truck; held not contributorily negligent as a matter of law); *Bradham v. McLean Trucking Co.*, 243 N.C. 708, 91 S.E. 2d 891 (1956) (motorist proceeding in fog created by health department truck spraying DDT, turned in front of oncoming tractor-trailer; held contributorily negligent as a matter of law); *Dawson v. Seashore Transportation Co., Inc.*, 230 N.C. 36, 51 S.E. 2d 921 (1949) (motorist proceeding into dense fog and smoke, reduced speed and struck defendant's unlighted bus; held not contributorily negligent as a matter of law); *Riggs v. Gulf Oil Corp.*, 228 N.C. 774, 47 S.E. 2d 254 (1948)

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Allen v. Pullen

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(motorist proceeding in dark and fog at 25 miles per hour struck unlighted truck parked on highway; held contributorily negligent as a matter of law); *Sibbitt v. R. & W. Transit Co.*, 220 N.C. 702, 18 S.E. 2d 203 (1942) (motorist proceeded through blankets of smoke on highway at night, struck unlighted truck on highway; held contributorily negligent as a matter of law); *Clark v. Moore*, 65 N.C. App. 609, 309 S.E. 2d 579 (1983) (motorist blinded by sun struck truck which had been abandoned on highway; held not contributorily negligent as a matter of law); *Doggett v. Welborn*, 18 N.C. App. 105, 196 S.E. 2d 36, *cert. denied*, 283 N.C. 665, 197 S.E. 2d 873 (1973) (motorist proceeded into "smoke bank" at reduced speed and struck vehicle which she knew had preceded her into the smoke; held contributorily negligent as a matter of law). It is apparent from these varied decisions that there is no absolute universal rule which may be applied; the conduct of each motorist must be evaluated in the light of the unique factors and circumstances with which he or she is confronted. Only in the clearest cases should a failure to stop completely be held to be negligence as a matter of law.

In the present case, Mrs. Pullen was confronted with dust, which at first did not appear to her to be any thicker than dust which she had seen created by other automobiles passing through the construction area, and she knew that Luann Smith had just driven through the construction area. She knew that flagmen were posted when work was in progress, and that work had usually ceased by the time she drove through the area in the afternoons. On this occasion there were no flagmen to indicate that work was still in progress. As she entered the dust, she became aware that it was thicker than she at first had thought; but before she could apply her brakes, the collision occurred. While a motorist has a duty to maintain a reasonable lookout and to anticipate the use of the highway by others, *White v. Mote*, *supra*, in the absence of anything which gives or should give notice to the contrary, one is not required to anticipate the negligence of others and is entitled to assume and to act on the assumption that others will exercise ordinary care for their own safety and the safety of others. *Norwood v. Sherwin-Williams Co.*, *supra*. The evidence raises a question for the jury as to whether, given the circumstances confronting Mrs. Pullen, her conduct in proceeding into the dust in the manner described was a failure to

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**Wohlfahrt v. Schneider**

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use ordinary care for her own safety. We hold that she was not contributorily negligent as a matter of law.

As permitted by G.S. 1A-1, Rule 50(c), plaintiff and Lowe's moved, alternatively to their motion for judgment notwithstanding the verdict, for a new trial. The motion for new trial was denied, and neither plaintiff nor Lowe's excepted to or brought forward as a cross-assignment of error the denial of the motion. The propriety of this ruling is therefore not before us. The verdict of the jury must be reinstated and judgment entered in accordance therewith. *See Snellings v. Roberts*, 12 N.C. App. 476, 183 S.E. 2d 872, *cert. denied*, 279 N.C. 727, 184 S.E. 2d 886 (1971).

The judgment notwithstanding the verdict entered by the trial court is reversed and this case is remanded to the Superior Court of Guilford County for reinstatement of the verdict and entry of judgment in accordance therewith.

Reversed.

Judges PHILLIPS and PARKER concur.

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DOUGLAS WOHLFAHRT AND WIFE, LYNN WOHLFAHRT v. LARRY G. SCHNEIDER, M.D.

No. 855SC1326

(Filed 15 July 1986)

**1. Courts § 21.10— conflict of law—note and security agreement—substantive law of Texas—procedural law of North Carolina**

Substantive issues in an action involving a note and security agreement were to be resolved by application of Texas law and procedural issues by application of North Carolina law where the note and security agreement were executed simultaneously in Texas, the security agreement specifically provided that the transaction would be governed by the law of Texas, the note specified that payment was due in North Carolina, the collateral was located in Texas, and both North Carolina and Texas have adopted the UCC. N.C.G.S. § 25-1-101 *et seq.* (1965 & Supp. 1985).

**2. Contracts § 21.3; UCC § 45— note and security agreement—defendant not in default—anticipatory breach**

The fact that a defendant in an action on a note and security agreement had not defaulted in payment at the time the suit was commenced did not

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**Wohlfahrt v. Schneider**

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necessarily defeat plaintiffs' claim in view of defendant's notice to plaintiffs demanding that they refund all payments and take possession of the goods.

**3. UCC § 23— note and security agreement for medical equipment—acceptance or rejection of equipment—findings not sufficient**

The appellate court could not determine whether a judgment awarding full recovery on a note was correct where the issue of whether defendant rightfully revoked his acceptance of goods was raised by the evidence and pleadings as amended by implication and the court failed to address in its findings and conclusions issues of whether the equipment was nonconforming, whether the nonconformity substantially impaired its value, whether defendant revoked his acceptance within a reasonable time after he discovered or should have discovered the grounds for revocation, the appropriate remedy under the Texas Business Code, and, if the value of the contract was not substantially impaired, other issues that arose upon defendant's testimony that certain of the items were not in proper working condition. N.C.G.S. § 1A-1, Rule 52(a)(1) (1983), N.C.G.S. § 1A-1, Rule 15(b) (1983).

**4. Abatement and Revival § 3— motion to abate denied—pending action in Texas—no error**

There was no error in the denial of defendant's motion to abate based on a pending action in Texas where there was no evidence other than an allegation in defendant's answer and brief that the same parties, the same promissory note and security agreement, the same alleged collateral, and the same transaction were involved; moreover, the pendency of a prior action in another state is not grounds for abatement of a subsequent action begun in North Carolina.

*APPEAL* by defendant from *Tillery, Judge*. Judgment entered 14 June 1985 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 7 May 1986.

On 18 October 1981, plaintiffs sold certain medical equipment, consisting of an x-ray machine, Kodak processor, examination tables, office furniture, copy machine, file cabinets, a Ritter table, EKG machines, instruments, laboratory equipment and numerous other items, to defendant. The equipment had been used by the male plaintiff for a short time in his family medical practice in the State of Texas which he closed in order to engage in training for a more specialized practice in obstetrics and gynecology. Defendant purchased the equipment in order to open a minor emergency treatment center in Humble, Texas. The sale took place in Texas, although plaintiffs were residents of North Carolina at the time.

The total sale price was \$48,500.00, with defendant executing a note for \$43,500.00. The note was secured by a security agreement granting plaintiffs a security interest in the equipment.

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**Wohlfahrt v. Schneider**

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Both instruments provided for monthly payments in the amount of \$1,034.87, beginning 1 November 1981, with interest on the unpaid balance at the rate of fifteen percent (15%) per annum, and attorney's fees in the event of default. The security agreement provided: "Seller agrees that the equipment is in full working condition, and will do such as required to see that the equipment functions properly" and that "[t]he law governing this secured transaction shall be the Uniform Commercial Code of Texas and other applicable laws of the State of Texas."

At the time of the sale, defendant delivered two checks to Mrs. Wohlfahrt; one in the amount of \$5,000.00, representing the down payment, and one in the amount of \$1,034.87, representing the first monthly payment which was due on 1 November 1981. Mrs. Wohlfahrt deposited the checks in her North Carolina bank, however, defendant subsequently contacted Mrs. Wohlfahrt and advised her that he had placed a stop payment order on his account because his wife's checkbook had been stolen. On 31 October 1981, he mailed her two additional checks, one in the amount of \$5,000.00 and one in the amount of \$1,034.87. In the meantime, defendant's Texas bank had refused to honor the original \$5,000.00 check due to the stop payment order, but honored the original \$1,034.87 check. As a result, plaintiffs received the \$5,000.00 down payment and the equivalent of two monthly payments.

Defendant subsequently discovered that the copier would not work, and incurred repair bills totalling slightly more than \$600.00. He notified Mrs. Wohlfahrt that he had experienced problems with the machine; the evidence is conflicting as to whether he ever sent copies of the repair bills to her for reimbursement. In any event, no reimbursement was made. Thereafter, according to the defendant's testimony, he discovered that the x-ray machine was a 200 MA machine rather than a 500 MA machine as had been represented by plaintiffs. On 13 November 1981, defendant's Texas attorney notified plaintiffs by Certified Mail that due to nonconformity of the goods substantially impairing their value, defendant was revoking his acceptance of the goods. The letter further requested a refund of all amounts which defendant had paid, and notified plaintiffs to take possession of the goods at defendant's office within thirty days.

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**Wohlfahrt v. Schneider**

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On 9 December 1981, plaintiffs brought this suit in New Hanover County seeking recovery of the amount due on the note. Defendant made a special appearance, moving to dismiss the action for lack of personal jurisdiction. The trial court denied the motion and that decision was affirmed by this Court. *Wohlfahrt v. Schneider*, 66 N.C. App. 691, 311 S.E. 2d 686 (1984). Defendant then filed answer including a motion to abate the action by reason of a pending action in the State of Texas involving the same subject matter and parties, and a general denial of plaintiffs' allegations.

The case was heard without a jury. The trial court found the following facts:

FIRST: That this is an action on a Promissory Note in which Complaint was filed and Summons issued on December 9, 1981. That a copy of the Summons and Complaint were thereafter served on Defendant on March 9, 1982.

SECOND: That Plaintiffs were citizens and residents of New Hanover County, North Carolina, at the time of the institution of this action, and that the Defendant is a citizen and resident of Harris County, Texas.

THIRD: That on October 18, 1981, the Plaintiffs sold to Defendant certain personal property, consisting of medical equipment and office equipment, for the sum of FORTY-EIGHT THOUSAND FIVE HUNDRED AND NO/100 (\$48,500.00) DOLLARS. That Defendant paid to Plaintiffs the sum of FIVE THOUSAND AND NO/100 (\$5,000.00) DOLLARS, as a down payment, and executed and delivered to Plaintiffs a Promissory Note for the balance remaining in the amount of FORTY-THREE THOUSAND FIVE HUNDRED AND NO/100 (\$43,500.00) DOLLARS.

FOURTH: That Defendant paid two (2) monthly installments in the amount of ONE THOUSAND THIRTY-FOUR AND 87/100 (\$1,034.87) DOLLARS, to Plaintiffs, and that Defendant, through an attorney, thereafter informed Plaintiffs in November, 1981, that he did not intend to honor his contract with Plaintiffs, and that he intended to revoke the same.

FIFTH: That since November, 1981, the Defendant has paid no other money to Plaintiffs under the Promissory Note,



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Wohlfahrt v. Schneider

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other than the two (2) monthly installments, and that there remains due and owing from Defendant to Plaintiffs the sum of FORTY-TWO THOUSAND FIVE HUNDRED ELEVEN AND 62/100 (\$42,511.62) DOLLARS.

Based on those findings, the court concluded that defendant's actions constituted "an anticipatory breach of his obligations under the Promissory Note . . ." and entered judgment for plaintiffs for the balance due on the note, interest, and attorney's fees. Defendant appeals.

*Larrick & Mason, by James K. Larrick, for plaintiff appellees.*

*Murchison, Taylor & Shell, by Michael Murchison and Nancy M. Guyton, for defendant appellant.*

MARTIN, Judge.

Defendant's principal contention on appeal is that the trial court erred in finding and concluding that his conduct constituted an anticipatory breach of the promissory note, justifying an award for the full amount due thereon, without considering and applying provisions of the Uniform Commercial Code which govern the right of a buyer of goods to revoke his acceptance of those goods. We agree with defendant that the evidence at trial raised issues which may be resolved only by application of provisions of the Uniform Commercial Code and that the trial court's findings and conclusions do not fully determine those issues. Accordingly, we vacate the judgment and remand the case to the trial court.

[1] As a preliminary matter, we deem it apposite to discuss briefly the issue of whether the substantive law of Texas or North Carolina governs the rights of the parties to this action. The note and security agreement at issue were executed simultaneously in the State of Texas. The security agreement specifically provided that the transaction would be governed by the law of Texas. The note specified that payment was due in North Carolina; the collateral was located in Texas. Both North Carolina and Texas have adopted the Uniform Commercial Code (UCC). N.C. Gen. Stat. § 25-1-101 *et seq.* (1965 & Supp. 1985); Texas Bus. Code Ann. § 1.101 *et seq.* (Vernon 1968 & Supp. 1986). Where the trans-

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Wohlfahrt v. Schneider

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action bears a reasonable relation to more than one state, the UCC permits the parties to agree with respect to which state's law shall govern their rights and duties. Texas Bus. Code Ann. § 1.105(a) (Vernon Supp. 1986); N.C. Gen. Stat. § 25-1-105(1) (1965). This section modifies traditional conflict of laws rules. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982). Since the goods are located in Texas and performance is due in this State, we hold, and the parties acknowledge, that the transaction bears a reasonable relationship to both states. Accordingly, the agreement of the parties requires that the substantive issues involved in this case be resolved by application of Texas law. Procedural issues, however, must be determined by application of the law of North Carolina. *Tennessee Carolina Transp., Inc. v. Strick Corp.*, 283 N.C. 423, 196 S.E. 2d 711 (1973).

[2] Defendant initially contends that plaintiffs' own evidence defeats their right to recover on the promissory note because it affirmatively discloses that he was not in default at the time plaintiffs commenced this action. We disagree. The note called for monthly installments of \$1,034.87 beginning 1 November 1981. The complaint was filed 9 December 1981; at that time, according to all the evidence, defendant had paid two monthly installments of \$1,034.87. However, the trial court concluded, based upon its finding that defendant had notified plaintiffs in November of his intention to revoke the contract, that defendant had effected an anticipatory breach of the contract. Under Texas law, an anticipatory breach of contract may exist "if, in positive and unconditional terms, a party refuses to perform further thereunder." *Barclaysamerican/Business Credit, Inc. v. E & E Enterprises, Inc.*, 697 S.W. 2d 694, 701 (Tex. Ct. App. 1985) (citing official commentary to Texas Bus. Code Ann. § 2.610 (1968), anticipatory repudiation "can result from action which reasonably indicates a rejection of the continuing obligation"). Accordingly, the fact that defendant had not defaulted in payment at the time the suit was commenced does not necessarily defeat plaintiffs' claim, in view of his notice to them demanding that they refund all payments and take possession of the goods.

[3] However, the same evidence relied upon by the trial court to establish defendant's anticipatory breach of the contract also raises the issue of his right to timely revoke his acceptance of the goods, as provided by Texas Bus. Code Ann. § 2.608 (Vernon

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Wohlfahrt v. Schneider

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1968). (See also N.C. Gen. Stat. § 25-2-608 (1965).) As provided by that section, a buyer, who has accepted goods, may revoke his acceptance and cancel the contract if the goods are nonconforming and the nonconformity substantially impairs the value of the goods. *Freeman Oldsmobile Mazda Co. v. Pinson*, 580 S.W. 2d 112 (Tex. Civ. App. 1979) (application for writ of error refused).

Although defendant's answer to the substantive allegations of the complaint consisted only of a general denial, and did not raise the issue of revocation of acceptance, that issue was raised by the evidence at trial. Defendant testified, without objection, that after he had accepted the equipment, he discovered that the x-ray machine was a 200 MA machine, unsuitable for his purposes, rather than a 500 MA machine as had been represented by plaintiffs. The copy machine required expensive repairs, and other items of equipment were not working properly. In addition, certain items which were to have been furnished by plaintiffs were not furnished. As a result, defendant, through his attorney, wrote to plaintiffs advising them that the goods were nonconforming, which substantially impaired their value, that he was revoking his acceptance of them, demanding a refund, and requesting that they take possession of the equipment. According to his testimony, Mrs. Wohlfahrt notified him that she was coming to Texas to take possession of the goods, but that she did not do so.

"When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." N.C. Gen. Stat. § 1A-1, Rule 15(b) (1983). Where no objection is raised at trial on the grounds that the proffered evidence is not within the scope of the pleadings no formal amendment is required and the pleadings are deemed amended by implication. *Taylor v. Gillespie*, 66 N.C. App. 302, 311 S.E. 2d 362, *disc. rev. denied*, 310 N.C. 748, 315 S.E. 2d 710 (1984). In addition, plaintiffs alleged in their complaint that defendant had notified them that he intended to revoke the contract.

In cases where the trial judge sits as the trier of facts, he is required to find facts upon all issues raised by the pleadings and evidence, declare the conclusions of law arising on the facts found, and enter judgment accordingly. N.C. Gen. Stat. § 1A-1, Rule 52(a) (1) (1983); *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E. 2d

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**Wohlfahrt v. Schneider**

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149 (1971). The requirement is designed to dispose of the issues raised and to permit "a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980).

In the present case, the issue of whether or not defendant rightfully revoked his acceptance of the goods was raised by the evidence and by the pleadings as amended by implication. The issue required consideration and application of the UCC, as adopted in Texas, and findings of fact with respect to whether the equipment was nonconforming and if so, whether the nonconformity substantially impairs its value and whether defendant revoked his acceptance within a reasonable time after defendant discovered or should have discovered that grounds for revocation existed. In the event that defendant is found to have rightfully revoked acceptance, a determination must be made as to the remedy available to him under the Texas Business Code. On the other hand, should the court find that any nonconformity did not substantially impair the value of the contract, other issues arise upon defendant's testimony that certain of the items were not in proper working condition, as had been warranted by plaintiffs. Since the trial court failed to address these issues in its findings and conclusions, this Court has no means of determining whether the trial court's judgment, awarding plaintiffs full recovery on the note, was correct. Therefore, we deem it necessary that this case be reconsidered at the trial level.

[4] Because we order a new trial, we consider it appropriate to briefly address defendant's assignment of error relating to the denial of his motion to abate this action. Although defendant asserts in his brief that "there is a pending action in the State of Texas involving the same parties, the same promissory note and security agreement, the same alleged collateral and the same transaction upon which plaintiffs have filed their complaint," the record is bereft of any evidence, other than a similar allegation in defendant's answer, to support this assertion. Even assuming, however, that an action was pending in the State of Texas of the nature and scope alleged by defendant, it would not support defendant's motion on abatement. The pendency of a prior action in the courts of another state, involving the same parties and subject matter, is not grounds for abatement of a subsequent action

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Reavis v. Reavis

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begun in this State. *Lehrer v. Edgecombe Mfg. Co., Inc.*, 13 N.C. App. 412, 185 S.E. 2d 727 (1972); 1 Strong's North Carolina Index 3d, Abatement and Revival § 3 (1976).

For the reasons stated, the judgment appealed from is vacated and this case is remanded to the Superior Court for a new trial in accordance with this opinion. The parties shall be permitted to amend their pleadings to conform them to the evidence, if they so desire.

Vacated and remanded.

Judges PHILLIPS and PARKER concur.

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JAMES LEE REAVIS v. MARGIE KAY JAMES REAVIS

No. 8522DC1255

(Filed 15 July 1986)

**Divorce and Alimony §§ 19.5, 24.5— child support—alimony and property settlement—lump sum payment—no refund upon change in child custody**

A lump sum payment of \$17,000 to defendant wife upon her withdrawal from the marital home pursuant to a consent judgment represented not only child support but also a negotiated settlement of defendant's property and support rights and included the effect of foreseeable changes in any of those matters, and the trial court had no authority to order a refund to plaintiff husband of a *pro rata* portion of the lump sum payment, absent the reservation of a right of amendment, when custody of a minor child who had been residing with defendant was transferred to plaintiff.

APPEAL by defendant from *Johnson (Robert W.)*, Judge. Judgment entered 24 September 1985, and orders entered 26 September 1985 in District Court, IREDELL County. Heard in the Court of Appeals 10 April 1986.

Defendant appeals a judgment directing repayment of a portion of a lump sum payment and enjoining her from using the balance in her account, as well as orders denying Rule 41 and Rule 56 motions for judgment in her favor.

Defendant wife and plaintiff husband married in 1962. They had four children, born 1963, 1965, 1968, and 1970. The parties

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**Reavis v. Reavis**

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separated in 1976 and executed a separation agreement. The agreement released all claims for alimony and recited that all marital personal property had been divided. Plaintiff agreed to pay defendant \$125 per week as "support and maintenance of herself and their four minor children," and to provide for the children's medical needs. The parties agreed that defendant would retain exclusive possession of the marital home "for herself and the children" until the youngest child attained majority. At the time of the separation, title to the marital home, having been conveyed three months earlier, was held by plaintiff's father as trustee. A final divorce based on one year's separation followed in 1977. The divorce judgment incorporated the terms of the separation agreement, "it being specifically ordered that the support and maintenance provided for thereunder be deemed child support. . . ."

Plaintiff's father later demanded rent and threatened to evict defendant and the children. The court construed the judgment in May 1983, ruling that plaintiff had agreed to provide the marital home or "comparable housing." The court ordered plaintiff to pay the rent demanded of defendant by his father or provide similar housing. The court's order referred in some places to plaintiff's obligation to provide housing for "defendant" and for "defendant and the minor children" and in others simply for "the minor children."

In September 1983, following further disputes on various matters, a consent judgment was entered which settled the issue of custody of the two children who were still minors. Plaintiff received custody of Clark, then 15, and defendant received custody of Chuck, then 13. Plaintiff agreed to pay the child support arrearages and with his father, to pay \$17,000.00 in a lump sum to settle all future matters as follows:

8. That plaintiff and [his father] shall pay to [defendant's attorney] \$17,000.00 which money shall be held in escrow by said attorney and be paid to defendant at such time as defendant removes herself from the marital home located on Wedgewood Drive, which removal shall be on or before October 2, 1983; that if defendant does not remove herself from said marital home by that date then, in that event, said attorney is to return the \$17,000.00 payment to plaintiff and

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**Reavis v. Reavis**

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[his father]; that if said payment is paid to defendant upon defendant's compliance with this condition, the payment shall be in satisfaction of all future support defendant shall have the right to receive from either [his father] or plaintiff for housing or for the minor children.

The \$17,000.00 was paid over to defendant.

Thereafter Chuck, then 15, expressed a desire to live with plaintiff instead of with defendant. He moved to plaintiff's home in June 1985. Plaintiff then filed a motion in August 1985 requesting that custody of Chuck be transferred, that defendant pay weekly support, and that defendant pay the balance of the \$17,000.00 to plaintiff for Chuck's benefit. Defendant did not contest custody nor her prospective obligation to pay some reasonable amount as child support. However, she contended that the payment provided by the original agreement was in lieu of alimony for herself, and asked that the plaintiff's request for repayment be denied. Defendant's motions for summary judgment and to dismiss were denied.

By judgment filed 24 September 1985 the court found that the lump sum payment of \$17,000.00 "was made in consideration of the defendant maintaining the care, custody and control of Chuck Reavis." The court then ordered that since defendant no longer had custody of Chuck, who lived with plaintiff, defendant should in fairness repay to plaintiff a portion of the lump sum proportional to the ratio of the length of time between Chuck's decision to live with plaintiff and his majority to the total time from the consent judgment to majority. From judgment for plaintiff for \$10,200.00, defendant appeals.

*T. Michael Lassiter for plaintiff-appellee.*

*Harris, Pressly & Thomas, by Edwin A. Pressly, for defendant-appellant.*

EAGLES, Judge.

The determinative question here is whether the trial court had authority to order repayment of a portion of the lump sum, which in obedience to a final judgment had been paid in full. Defendant argues that the lump sum payment represented at least in part a property settlement, and therefore could not be

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Reavis v. Reavis

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modified since it had been fully executed. Plaintiff argues that the \$17,000.00 was paid solely for child support and that orders for child support, including lump sum payments, are modifiable at any time.

## I

We first consider what type of question this appeal presents in order to determine the proper standard of review. The essential facts do not appear to be in dispute. Rather, the parties differ over the nature and interpretation of various judgments. The trial court was called on to decide whether the housing provisions of the separation agreement, as modified, should be construed as an agreement for child support or otherwise. A court with authority to render a judgment also has power to construe and clarify its own judgments. The construction of a judgment presents a question of law for the court. 49 C.J.S. Judgments Section 436 (1947), *cited in Alexander v. Brown*, 236 N.C. 212, 72 S.E. 2d 522 (1952). The trial court's rulings on questions of law are fully reviewable on appeal. *N.C. Reinsurance Facility v. N.C. Insurance Guaranty Assn.*, 67 N.C. App. 359, 313 S.E. 2d 253 (1984).

Judgments must be interpreted like other written documents, not by focusing on isolated parts, but as a whole. *White v. Graham*, 72 N.C. App. 436, 325 S.E. 2d 497 (1985). The interpreting court must take into account the pleadings, issues, the facts of the case, and other relevant circumstances. *Queen City Coach Co. v. Carolina Coach Co.*, 237 N.C. 697, 76 S.E. 2d 47 (1953); *White v. Graham*, *supra*.

The original separation agreement made provision for periodic payments for "support and maintenance," which payments were deemed by the divorce judgment to be child support. Defendant received no payments of alimony or support in her own right, but she did not formally renounce her rights to the payments. Apparently she had initially claimed those payments on the grounds of his relationship with another woman. Occupation of the marital home was separately provided for, for the benefit of defendant *and* the children. It is clear that the occupation of the home until the children became of age was at least in part a settlement of property or alimony rights for the benefit of defendant herself, as the express language of the agreement indicates. It undoubtedly constituted some part of the consideration



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Reavis v. Reavis

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for the remainder of the agreement. That the provision terminated upon the majority of the youngest child, while relevant, does not require a different result.

The court's order of May 1983 contains conflicting language in this regard. At one point it recites that the housing was "for the benefit of the minor children," at several places it discussed housing "for defendant and the minor children" and noted at another that plaintiff was obligated to provide "defendant" with comparable housing without mentioning the children. We note that the May 1983 order resulted from proceedings to evict not just defendant, but defendant *and* the children from the home. We believe that the court was only addressing that problem (the wholesale eviction of the family) at that time, and that the inconsistent references to housing for certain parties or for certain persons' benefit did not represent a considered construction of the judgment.

The language of the consent judgment subsequently entered into supports this interpretation. Payment of the \$17,000 lump sum was in satisfaction of *defendant's* rights to future support, *not* for the benefit of the minor children or for housing for them, *but* for support *defendant* had the right to receive for "*housing or for the minor children.*" This language, as well as the very nature of the lump sum payment, clearly reflects some separate property settlement/support interest of defendant herself in the lump sum, as well as child support.

## II

Having reached this conclusion, we now must decide its effect on the court's power to modify the executed lump sum payment provision. In *Walters v. Walters*, 307 N.C. 381, 298 S.E. 2d 338, *reh'g denied*, 307 N.C. 703 (1983), the Supreme Court considered modification of interspousal consent judgments. The court noted that they are modifiable "within certain carefully delineated limitations," *id.* at 385, 298 S.E. 2d at 341, suggesting that the modification powers of the courts should be exercised cautiously. This is consistent with the general rule limiting attacks on consent judgments to certain narrow grounds. *In re Johnson*, 277 N.C. 688, 178 S.E. 2d 470 (1971). The *Walters* court went on to rule that if the contested provisions concerned alimony, modification would be proper under G.S. 50-16.9. "However,

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**Reavis v. Reavis**

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if the provisions in question concern some aspect of a property settlement, then it may be modified only so long as the court's order remains unsatisfied as to that specific provision." 307 N.C. at 385, 298 S.E. 2d at 341. *See also Rowe v. Rowe*, 305 N.C. 177, 287 S.E. 2d 840 (1982) (presumption that property settlement and support provisions separable).

We noted earlier that the courts generally are reluctant to allow attacks on consent judgments. This policy stems in part from the recognition that a consent judgment, in the absence of fraud, duress or mutual mistake (none of which appear here), represents a negotiated agreement reached with an eye to events likely to follow the judgment. The possibility that Chuck might die, move away, or become emancipated before reaching majority cannot have been totally unforeseen by the parties at the time they agreed on the lump sum. We note that the judgment itself made no provision for such occurrences.

We are aware also that a judgment, from which no appeal is taken and which is paid in full, cannot ordinarily be reopened. *Bunker v. Bunker*, 140 N.C. 18, 52 S.E. 237 (1905). In domestic situations we have occasionally countenanced modifications of judgments where there were unpaid past due payments, but only where compelling equitable circumstances exist. *See Gates v. Gates*, 69 N.C. App. 421, 317 S.E. 2d 402 (1984), *aff'd* 312 N.C. 620, 323 S.E. 2d 920 (1985). We have found no North Carolina domestic case, including those where (unlike this case) there were compelling equities, where the courts have ordered a refund of payments *already made*. Accordingly, we are inclined to believe that the court here did not have authority to modify the consent judgment to order repayment of part of the lump sum.

Decisions of other jurisdictions in similar fact situations support this result. In *Petty v. Petty*, 479 So. 2d 1288 (Ala. Civ. App. 1985), the trial court attempted to reduce the unpaid balance of a consent judgment calling for a \$10,000 lump sum payment of child support, where only \$3,500 had in fact been paid. The Court of Civil Appeals reversed, holding that the lump sum became a final judgment on the date due and could not be modified thereafter. In *Hunter v. Hunter*, 13 Ark. App. 204, 681 S.W. 2d 424 (1984), the court held that the rent-free disposition of the marital home to mother in a consent judgment could not be modified even though

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Reavis v. Reavis

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the minor children had moved in with their father. The disposition of the home, held the court, constituted one part of the consideration on which all the other parts of the agreement were based and hence was not modifiable. The *Hunter* court relied on *McInturff v. McInturff*, 7 Ark. App. 116, 644 S.W. 2d 618 (1983), where the court held a lump sum payment to mother could not be modified, although the minor children had moved in with the father who had obtained legal custody. The parties' separation agreement there represented a single integrated disposition of all matters, including property settlement, alimony and child support, and father could therefore not receive a *pro rata* refund of the lump sum. Compare, *Pauley v. Pauley*, 263 S.E. 2d 897 (W. Va. 1980) (lump sum child support could be increased, even though dependent spouse had agreed not to seek additional support).

From the foregoing discussion we conclude that the lump sum payment represents *not only* child support, but that it constituted a negotiated settlement of all matters of dispute between the parties including the effect of foreseeable changes in those matters, that there are no compelling equitable circumstances justifying a refund. We conclude further that there appears to be no authority for ordering refunds of lump sums which have been paid in full where no right of amendment has been reserved. Indeed, the limited authority of this and other states supports the opposite result. On these facts, therefore, the trial court did not have authority to reduce the lump sum payment and order a refund.

One practical consideration reinforces our decision. Unless the power of the trial courts to modify lump sum agreements is carefully circumscribed, the agreements' usefulness as negotiated settlements will be substantially diminished. The public policy of this State seeks to promote certainty and finality in domestic dispute resolution. See *Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E. 2d 100 (1986). Our decision today serves that policy. Recognizing a general power to modify *executed* lump sum payments would not, and might instead touch off new waves of domestic litigation.

Since we have determined that the trial court was without authority to order a refund here, we need not reach the remaining questions. The trial court's order is hereby vacated, and the

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**State v. Warren**

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injunction barring defendant's use of the balance of the funds is dissolved.

Vacated; injunction dissolved.

Judges WEBB and PARKER concur.

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STATE OF NORTH CAROLINA v. PETER WARREN

No. 8520SC1232

(Filed 15 July 1986)

**1. Criminal Law § 143.4— parole revocation hearing—waiver of counsel—intelligent and voluntary**

Defendant's waiver of counsel in his parole revocation hearing was effective where the trial court certified that defendant had been fully informed and there was no indication in the record to support defendant's contention that the waiver was not knowing, intelligent and voluntary. N.C.G.S. § 15A-1345(e) (1983). N.C.G.S. § 15A-1242.

**2. Criminal Law § 143.12— parole revocation—consecutive sentence—not designated in judgment order—no error**

The trial court did not err in a probation revocation hearing by failing to designate in the judgment order that the activated sentences were to run consecutively with a five-year sentence on the last (1985) charge; the trial judge in the 1985 case had specified that his sentence was to be consecutive with any sentence from probation revocation. N.C.G.S. § 15A-1354(a) (1985 Cum. Supp.).

APPEAL by defendant from *Helms, Judge*. Judgment entered 1 July 1985 in Superior Court, RICHMOND County. Heard in the Court of Appeals 5 March 1986.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Karen E. Long, for the State.*

*George E. Crump, III, for defendant appellant.*

BECTON, Judge.

On 5 April 1985, defendant Peter Warren pleaded guilty to breaking or entering and possession of implements of housebreaking and was sentenced to five years in prison. Defendant had been convicted in 1983 of uttering forged paper, breaking or

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State v. Warren

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entering and larceny and sentenced to ten years in prison, suspended, after 141 days, for four years probation. Defendant had also been convicted in 1984 of credit card theft or withholding, breaking or entering and larceny and sentenced to three years in prison, suspended for five years probation.

Having violated the condition of his probation that "he commit no criminal offense in any jurisdiction" for the duration of his probation, a probation revocation hearing was held on 1 July 1985, and the superior court activated the defendant's 1983 ten-year sentence and defendant's 1984 three-year sentence. Defendant, who signed a waiver of his right to assigned counsel, now challenges the revocation proceeding as lacking in due process because the waiver was not knowingly, intelligently, and voluntarily made. Defendant contends that he was therefore effectively denied the assistance of counsel to which he is entitled under N.C. Gen. Stat. Sec. 15A-1345(e) (1983). We do not agree with defendant's contentions, and we affirm.

## I

[1] There is a statutorily recognized right to counsel at a probation revocation hearing in North Carolina that goes beyond the federal constitutional right enunciated in *Gagnon v. Scarpelli*, 411 U.S. 778, 36 L.Ed. 2d 656, 93 S.Ct. 1756 (1973). See G.S. Sec. 15A-1345(3) (1983); *State v. Coltrane*, 307 N.C. 511, 514, 299 S.E. 2d 199, 201 (1983). This right can be knowingly, intelligently and voluntarily waived; however, waiver cannot be inferred from a silent record. *State v. Neeley*, 307 N.C. 247, 252, 297 S.E. 2d 389, 393 (1982).

When a defendant waives counsel at or before the trial phase of the proceedings against him or her, the record must show that the defendant was literate and competent, that he or she understood the consequences of the waiver, and that, in waiving the right, the defendant was voluntarily exercising his or her own free will. *State v. Thacker*, 301 N.C. 348, 354, 271 S.E. 2d 252, 256 (1980) (citing *Faretta v. California*, 422 U.S. 806, 45 L.Ed. 2d 562, 95 S.Ct. 2525 (1975)).

Although we have found no North Carolina cases that directly address the sufficiency of the waiver issue in the probation revocation context, there is federal case law that we find instruc-

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State v. Warren

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tive and persuasive. In *United States v. Ross*, 503 F. 2d 940 (5th Cir. 1974), the defendant's lawyer was not notified of the revocation hearing because of the court's clerical error. Defendant was advised of his right to counsel, but waived it because he thought the hearing was "sort of informal." *Ross*, 503 F. 2d at 945. He did not sign a written waiver, and the record supported his contention that he had waived counsel under a misapprehension about the nature of the proceeding. The appeals court stated:

. . . the record fails to show that Ross's waiver of counsel was a knowing and intelligent one. He was told that he had a right to counsel, but *at no point was he advised of the dire consequences that could flow from the proceeding*; that is, that he might immediately be returned to prison to serve the previously suspended two years and eight months of his term. Although the district judge certainly determined that Ross's waiver was voluntarily, *his inquiries never touched upon Ross's understanding of the significance of the waiver—or of the hearing itself*. Indeed, from Ross's statements the court reasonably could have inferred that Ross did not actually grasp the import of the proceeding. . . .

*Id.* (emphasis added).

In addition, we look by way of analogy to N.C. Gen. Stat. Sec. 15A-1242 (1983) and the cases which have interpreted that section.

N.C. Gen. Stat. Sec. 15A-1242 provides:

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

- (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
- (2) Understands and appreciates the consequences of this decision; and
- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments. (1977, c. 711, s. 1.)

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State v. Warren

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Compliance with the dictates of this section has been held to fully satisfy the constitutional requirement that waiver of counsel be knowing and voluntary. *State v. Thacker*, 301 N.C. at 355, 271 S.E. 2d at 256.

Defendant argues that because there is no record that the trial court informed him of the range of permissible punishment he could receive from the probation violations, his waiver could not have been knowing and voluntary. We agree that when there is *no* evidence in the record that the trial court made a thorough inquiry sufficient to comport with the dictates of G.S. Sec. 1242, due process requirements have not been met. And even when the court signs a certification indicating that this procedure has been followed, but the record belies that fact, the waiver will be invalidated. *See State v. Hardy*, 78 N.C. App. 175, 179, 336 S.E. 2d 661, 664 (1985); *State v. Wells*, 78 N.C. App. 769, 338 S.E. 2d 573 (1986).

In this case, defendant signed the standard written waiver:

As the undersigned party in this action, I freely and voluntarily declare that I have been clearly advised of my right to the assistance of counsel, that I have been fully informed of the charges against me, the nature of and the statutory punishment for each such charge, and the nature of the proceedings against me; that I have been advised of my right to have counsel assigned to assist me in defending against these charges or in handling these proceedings, and that I fully understand and appreciate the consequences of my decision to waive counsel.

I freely, voluntarily and knowingly declare that I do not desire to have counsel assigned to assist me, that I expressly waive that right, and that in all respects I desire to appear in my own behalf, which I understand I have the right to do.

s/ PETER WARREN

Signature of Defendant

The court certified that the defendant had been "fully informed in open Court of the nature of the proceedings or the charges against him and of his right to have counsel assigned . . . and that he has executed the . . . waiver in my presence after its meaning and effect have been explained to him."

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State v. Warren

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Unlike the situations in *Ross*, *Hardy* and *Wells*, there is no indication in the record before us that defendant misunderstood the nature of the proceedings, was misunderstood by the court, or was given no chance to explain. When asked if he had anything to say, defendant replied:

[Defendant]: Yes, sir. I just—I'm already doing time and I'd like to say that I'm guilty naturally by being sentenced. In other words, I automatically revoked my probation, but ask if any way possible, since this sentence is to be run consecutive—I lay myself on the mercy of the Court.

This suggests that defendant *did* comprehend the nature of the charges and proceedings and at least the maximum possible punishment. We are constrained to infer from the written, signed waiver and the court's certification thereof, that the dictates of G.S. Sec. 15A-1242 were followed. Defendant has simply failed to show that the waiver he executed was not knowing and voluntary.

In so holding, we nevertheless reject the State's argument that every defendant who consents to the terms of probation is charged with constructive knowledge of the implications of a probation violation, and therefore, of a probation revocation proceeding. *State v. Acuff*, 9 N.C. App. 715, 177 S.E. 2d 304 (1970), upon which the State relies for this proposition, was decided before the General Assembly saw fit to codify both the right to counsel at the probation revocation hearing stage and the constitutional dictates of *Faretta* for waiver of the right to counsel at the trial stage.

In addition, trial courts have great discretion in probation revocation proceedings. Among other things, the court may revoke the probation and impose the original sentence, revoke the probation and impose a reduced sentence, or continue the defendant on probation. See N.C. Gen. Stat. Sec. 15A-1344(d) (1983). By consenting to the conditions of probation, defendants do nothing more than acknowledge that they are "subject to" imposition of the original sentence. They do not forfeit their right to a knowing and voluntary waiver of counsel. To confer a right to counsel in a probation revocation hearing, but not the concomitant procedural safeguards which ensure that waiver of that right is knowingly



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State v. Warren

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and voluntarily made, is to grant defendants a hollow protection indeed.

A waiver of counsel is ineffective at the probation revocation stage when the record fails to show that the defendant has knowingly and voluntarily waived the right; that is, after the trial court has made thorough inquiry and is satisfied that the defendant has been clearly advised of the right to counsel, that the defendant understands and appreciates the consequences of the decision to proceed *pro se*, and that the defendant comprehends the nature of the charges and proceedings and the range of possible punishments. When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates otherwise. The defendant in the instant case signed such a waiver, the trial court certified that defendant had been advised per G.S. Sec. 1242, and there is no record to support defendant's contention that the waiver of counsel was not knowing, intelligent and voluntary. Therefore, we must overrule this assignment of error.

## II

[2] Defendant's second assignment of error is that the trial court failed to designate in the judgment order that the activated sentences were to run consecutively with the five-year sentence on the 1985 charges.

N.C. Gen. Stat. Sec. 15A-1354(a) (1985 Cum. Supp.) provides in part:

[W]hen a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment . . . the sentences may run either concurrently or consecutively, as determined by the court. If not specified, or not required by statute to run consecutively, sentences shall run concurrently.

The undischarged terms of imprisonment to which defendant was subject here were the suspended sentences in the 1983 and 1984 cases. When sentence was imposed in the 1985 case, the court properly designated *that* sentence to be "Five (5) years. To run consecutive with any sentence [defendant] may receive from [probation] Revocation in Richmond County." It was not neces-

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**Schiller v. Scott**

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sary, as defendant contends, for the trial court in the probation revocation proceeding to state that the activated sentences in the 1983 and 1984 cases would run consecutively with the 1985 case, because it was to happen the other way around. This assignment of error is overruled as well.

We find

No error.

Judges JOHNSON and MARTIN concur.

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MARY S. SCHILLER v. DAVID H. SCOTT AND DOROTHY BELL SCOTT, AND  
DAVID E. HUFFINE, SUBSTITUTE TRUSTEE

No. 855SC1347

(Filed 15 July 1986)

- 1. Registration § 5— deed of trust—wife's joinder to release marital interest—subsequent deed of trust to wife—prior recordation—"between parties" exception to recordation statute inapplicable**

A wife who joined her husband in the execution of a deed of trust to plaintiff merely to release her marital interest was not a "party" to the deed of trust within the purview of the "between parties" exception to the recording statute for deeds of trust, N.C.G.S. § 47-20. Therefore, a subsequent deed of trust on the same property executed by the husband to the wife which was supported by consideration and which was recorded before recordation of the deed of trust to plaintiff had priority over the deed of trust executed by the husband and wife to plaintiff.

- 2. Registration § 5— deed of trust—wife as witness—subsequent deed of trust to wife—protection of recordation statute**

There is no "witness" exception to the deed of trust recordation statute, N.C.G.S. § 47-20. Therefore, a wife to whom a husband executed a deed of trust did not lose her protected lien creditor status under N.C.G.S. § 47-20 because she was a witness to a prior deed of trust on the same property from the husband to plaintiff which was recorded after recordation of the deed of trust to the wife.

APPEAL by plaintiff from *Winberry*, Judge. Judgment entered 6 August 1985 *nunc pro tunc* 5 August 1985 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 13 May 1986.

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**Schiller v. Scott**

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On 5 September 1984 defendant David Scott executed a note and deed of trust in the principal amount of \$25,000 in favor of plaintiff. The property conveyed by this deed of trust (Schiller deed of trust) was owned solely by defendant David Scott. Defendant Dorothy Scott, wife of defendant David Scott, joined in the execution of the Schiller deed of trust to release any contingent marital interest in the property pursuant to N.C. Gen. Stat. 39-7. The Schiller deed of trust was recorded in the New Hanover County Register of Deeds Office on 10 September 1984.

On 7 September 1984 defendant David Scott executed another deed of trust on the same property securing a note in the principal amount of \$38,000 in favor of his wife, defendant Dorothy Scott. The Scott deed of trust was recorded in the New Hanover County Register of Deeds Office on 7 September 1984, three days prior to recordation of the Schiller deed of trust.

Defendant David Scott failed to make payments under either note, and the substitute trustee in the Scott deed of trust commenced foreclosure proceedings on the subject property. Plaintiff filed this action seeking, *inter alia*, a declaration that the Schiller deed of trust has priority over the Scott deed of trust. The court concluded, instead, that the Scott deed of trust has priority over the Schiller deed of trust, and it granted defendant Dorothy Scott's motion for summary judgment.

Plaintiff appeals.

*Yow, Yow, Culbreth & Fox, by Stephen E. Culbreth and Ralph S. Pennington, for plaintiff appellant.*

*Carter & Carter, P.A., by James Oliver Carter, and Burney, Burney, Barefoot, Bain & Crouch, by Auley M. Crouch, III, for defendant appellee.*

WHICHARD, Judge.

Plaintiff contends the court erred in granting summary judgment in favor of defendant Dorothy Scott. Specifically, she contends the court erred in holding that the Scott deed of trust is a valid lien upon the subject property with priority over the Schiller deed of trust. We disagree.

N.C. Gen. Stat. 47-20, the recording statute for deeds of trust, provides:

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**Schiller v. Scott**

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No deed of trust or mortgage of real or personal property, or of a leasehold interest or other chattel real, or conditional sales contract of personal property in which the title is retained by the vendor, shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the grantor, mortgagor or conditional sales vendee, but from the time of registration thereof as provided in this Article . . . .

"This statute is virtually identical to the statute governing outright conveyances, G.S. 47-18, and the two are construed alike." *Schuman v. Roger Baker and Assoc.*, 70 N.C. App. 313, 315, 319 S.E. 2d 308, 310 (1984). "These statutes provide in essence that the party winning 'the race to the [courthouse]' will have priority in title disputes." *Id.*

While most jurisdictions have a form of recordation statute which protects *subsequent* grantees from prior conveyances only if they have paid value and purchased without actual notice of a prior unrecorded conveyance, the recordation statute in effect in North Carolina protects *any* purchaser for value of specific land who records first, whether he has notice of a prior unrecorded conveyance or not, and irrespective of whether he is a prior or subsequent purchaser. . . . This concept is frequently expressed in the following manner: "No notice, however full or formal, will supply the want of registration of a deed." Thus in North Carolina, if a grantor conveys real property to A and later conveys the same interest to B for a valuable consideration, and B records first, he will have the superior right in the real property even though B had actual notice of the prior conveyance. Although the grantor has conveyed good title to A and has no further title to convey, the grantor retains a *power* to defeat his earlier conveyance, if it is not recorded, by another conveyance to a second grantee.

. . . .

Thus it is all important for a grantee to immediately record any deed which he receives in order to protect himself against prior or subsequent purchasers from the same grantor with respect to the land granted.

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Schiller v. Scott

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Webster, *Real Estate Law in North Carolina* Sec. 370 at 402-03 (Rev. Ed. 1981). See also *Ellington v. Supply Company*, 196 N.C. 784, 789, 147 S.E. 307, 310 (1929) ("In construing the registration laws of this State, this Court has consistently held that no notice, however full and formal, will supply the place of registration"); *Schuman, supra*, 70 N.C. App. at 316, 319 S.E. 2d at 310.

[1] The issue is whether defendant Dorothy Scott is a valid lien creditor entitled to protection under N.C. Gen. Stat. 47-20. It is undisputed that she won "the race to the courthouse." She recorded her deed of trust three days before plaintiff recorded hers. Further, the record shows that defendant David Scott borrowed \$13,000 from defendant Dorothy Scott with her permission in August 1984 and also made an unauthorized withdrawal of \$25,000 from her money market account which she discovered in September 1984. These preexisting debts constitute the type of "valuable consideration" which would ordinarily bring defendant Dorothy Scott's lien "within the purview of the registration statute," N.C. Gen. Stat. 47-20, and thus make her a valid lien creditor. *Finance Corp. v. Hodges*, 230 N.C. 580, 582, 55 S.E. 2d 201, 203 (1949).

Plaintiff contends, however, that since defendant Dorothy Scott joined in the Schiller deed of trust to release her marital interest she was a party to that instrument and, as such, is not entitled to protection under N.C. Gen. Stat. 47-20. Citing *Patterson v. Bryant*, 216 N.C. 550, 5 S.E. 2d 849 (1939), plaintiff maintains that as between parties the instrument first executed, rather than the one first registered, has lien priority. Since the Scotts executed the Schiller deed of trust first, plaintiff contends that it should have priority over the Scott deed of trust even though the Scott deed of trust was recorded first.

In *Patterson* plaintiff-grantee failed to record a timber deed from defendant-grantor before defendant-grantor conveyed the same interest to other grantees who recorded first. The Court held that defendant-grantor was not protected by the recording statute vis-a-vis plaintiff-grantee and plaintiff-grantee thus could maintain an action of *assumpsit* against him. *Patterson*, 216 N.C. at 553-54, 5 S.E. 2d at 850-51. The Court premised its holding on the general rule that an unregistered deed is valid as between the parties without registration. *Id.* See also *Sales Co. v. Weston*, 245 N.C. 621, 626, 97 S.E. 2d 267, 271 (1957).

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Schiller v. Scott

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*Patterson*, however, does not control here. In *Maples v. Horton*, 239 N.C. 394, 80 S.E. 2d 38 (1954), plaintiff sought to enforce certain restrictions in a deed from her and her husband which conveyed property owned solely by the husband. Plaintiff had joined in the execution of the deed merely to release her inchoate right of dower. *Id.* at 399-400, 80 S.E. 2d at 42-43. The Court held that she could not enforce the deed restriction. *Id.* at 401, 80 S.E. 2d at 43. It stated:

[A] married woman who joins her husband in the execution of a deed to his property, merely to release her inchoate right of dower, conveys nothing and is not bound by the covenants in such deed.

. . . .

"[She] incurs no obligation by reason of any collateral and merely personal covenant which may be inserted in the deed, and much less by any representation which it may contain. Such covenants or representations, though in form joint, must be regarded as intended to be the acts of the husband alone, and as operative upon him only and not upon the wife, who unites in the deed for the purpose of barring her right of dower, and cannot be presumed to have entered into all the particulars of a contract in which she has so remote and indirect an interest."

*Id.* at 399-400, 80 S.E. 2d at 42-43. Under *Maples*, "when a wife joins her husband in the execution of a deed to convey property owned solely by him, merely to release her inchoate right of dower, she neither is a grantor of the premises nor incurs any obligations by representations or covenants in the deed." *Wellons v. Hawkins*, 46 N.C. App. 290, 291, 264 S.E. 2d 788, 789 (1980).

We hold that this principle operates here to place defendant Dorothy Scott outside the *Patterson* "between parties" exception to N.C. Gen. Stat. 47-20. She was not a "party" to the Schiller deed of trust as contemplated by *Patterson* for purposes of N.C. Gen. Stat. 47-20 since she signed this instrument merely to release her marital interest and did not incur any liability thereon as a grantor to plaintiff as a grantee. *Maples, supra; Wellons, supra.*

[2] Defendant Dorothy Scott was a witness to the Schiller deed of trust and arguably, as a witness to this instrument, she should

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Schiller v. Scott

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not enjoy protected lien creditor status under N.C. Gen. Stat. 47-20. See *King v. Peoples Bank and Trust Co.*, 371 So. 2d 257, 262-64 (La. 1979). The Court in *King* held that defendant-bank could not rely on Louisiana's statutory counterpart to N.C. Gen. Stat. 47-20 for protection as a "third party" creditor since the bank's attorney had prepared the closing documents for a prior, unregistered transaction, and accordingly the bank was a witness to this earlier, unrecorded conveyance. *Id.*

The "witness" exception to the recordation requirement is not applicable in this jurisdiction, however. The *King* court applied relevant Louisiana statutes which specifically provided that "witnesses to the act by which the mortgage [or sale] was stipulated" were not protected "third persons" under the recording statute. *King*, 371 So. 2d at 263. North Carolina has no counterpart to these provisions. Further, a "witness" exception to N.C. Gen. Stat. 47-20 would contravene the strong, well-established policy behind the recording statutes, stated by our Supreme Court as follows:

The Connor Act . . . is firmly imbedded in our law. Its wisdom has clearly demonstrated itself in the certainty and security of titles in this State which the public has enjoyed since its enactment. It is necessary in the progress of society, under modern conditions, that there be one place where purchasers may look and find the status of title to land. Hence, in applying this act it has become axiomatic with us that "no notice, however full and formal, will take the place of registration."

*Turner v. Glenn*, 220 N.C. 620, 624-25, 18 S.E. 2d 197, 200-01 (1942).

Other than the *Patterson* "between parties" exception, North Carolina courts have only held or acknowledged that estoppel, fraud, or actual or constructive knowledge of pending litigation can defeat the priority of valid lien creditors or purchasers for a valuable consideration. See, e.g., *Bourne v. Lay & Co.*, 264 N.C. 33, 35, 140 S.E. 2d 769, 771 (1965) (actual knowledge of prior unregistered deed will not defeat the title of a purchaser for value in the absence of fraud or matters creating estoppel); *Hill v. Memorial Park*, 304 N.C. 159, 165, 282 S.E. 2d 779, 783 (1981) (purchaser claiming protection under recording statutes has the

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Dept. of Trans. v. Byrum

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burden of proving that he or she is an innocent purchaser for value, i.e., that he or she paid valuable consideration and had no actual notice, or constructive notice by reason of *lis pendens*, of pending litigation affecting title to the property). *Schuman, supra*, 70 N.C. App. at 315-17, 319 S.E. 2d at 310-11, establishes that actual knowledge of a prior unrecorded conveyance is not a matter creating an estoppel, and thus the estoppel doctrine is inapplicable to the facts here.

In sum, no exception to the recordation requirement operates to deny defendant Dorothy Scott protection under N.C. Gen. Stat. 47-20. We thus hold that the court properly concluded that the Scott deed of trust is a valid lien upon the subject property with priority over the Schiller deed of trust. Since there is no genuine issue as to any material fact and defendant Dorothy Scott was entitled to a judgment as a matter of law, summary judgment in her favor was proper. N.C. Gen. Stat. 1A-1, Rule 56.

Affirmed.

Judges WEBB and JOHNSON concur.

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DEPARTMENT OF TRANSPORTATION v. WILLIAM D. BYRUM AND WIFE, ESTELLE W. BYRUM; J. LARKIN LITTLE, TRUSTEE; HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF EASTERN CAROLINA; FOREMAN'S, INC.; STEVE HAMPTON PLUMBING & SUPPLY COMPANY; AND GEORGE OWEN

No. 862SC74

(Filed 15 July 1986)

**Eminent Domain § 6.4— value of property—income approach—not allowed**

There was no error in a condemnation case in the exclusion of expert testimony regarding the fair market value of land based on lost business income. The two *Raleigh-Durham Airport Authority* cases, 75 N.C. App. 57 and 75 N.C. App. 121, did not change the rule that lost profits and lost income cannot be considered in an award pursuant to a taking. N.C.G.S. § 136-112(1).

APPEAL by defendants from *Brown, Judge*. Judgment entered 21 June 1985 in Superior Court, WASHINGTON County. Heard in the Court of Appeals 15 May 1986.



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Dept. of Trans. v. Byrum

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This is a condemnation case instituted 27 June 1983 which arose when plaintiff Department of Transportation sought to take land in which all defendants had or claimed an interest. Defendants William D. Byrum and wife Estelle W. Byrum are record holders; all remaining defendants are lien or judgment creditors. Plaintiff deposited the sum \$15,700.00 as estimated just compensation for the appropriation of a .208-acre tract on the south shore of Albemarle Sound, needed in the replacement of a bridge spanning Albemarle Sound.

The .208-acre tract at issue is part of the 3.447 acres owned by Mr. and Mrs. Byrum. Improvements on the Byrum's property include a house, a restaurant, a game room, and a campground with forty (40) hookups for campers. The strip of land taken by plaintiff included twenty-eight (28) camper septic tank hookups, which, according to Mrs. Byrum's voir dire testimony, had to be disconnected and could not be relocated elsewhere on the property. On 20 May 1985, the case went to trial only on the issue of just compensation. During the course of defendants' opening statement, defendants' counsel stated:

Our evidence is going to show that all of this area in here with the exception of their house was operated as a business, as a going business open 365 days a year so that [sic] use and benefit of the general public out of which they generated income. I believe that our evidence is going to show that there has been a substantial decrease in the total income that they earned from that quarter.

Plaintiff objected to this statement and the court sustained the objection. At the close of opening statements, the court conducted a voir dire hearing to determine the admissibility of the testimony regarding loss of business income. Defendants' expert witness Jack A. Williford testified at the voir dire hearing that in his opinion the fair market value of the land taken was \$95,000.00 and that this amount was based primarily on the income approach to valuing commercial property.

On cross-examination, plaintiff asked the following question, which Mr. Williford answered as follows:

Q. Now when you say you used the income approach, then you did not use the established rental value of the property

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Dept. of Trans. v. Byrum

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before and after? You used purely the gross income and the profits derived from the businesses which were being operated on the property?

A. Yes, sir, that's exactly what I used.

Mr. Webb: Your Honor, that would be what we would object to and move to strike his testimony.

The court sustained plaintiff's objection. At the voir dire examination of defendant Estelle Byrum, she testified that the fair market value of the taken land was \$141,000.00. She testified that she calculated that value as follows: "from the time we bought the place, what it is worth to us and from after the State took the piece of land, what it was worth to us after because we lost our whole trailer park." The court sustained plaintiff's objection to this testimony. When the jury returned, defendants stated, "There will be no evidence for us, your Honor." The court entered judgment based upon the pleadings and awarded damages in the amount of \$15,700.00, the original court deposit. Defendants William D. Byrum and Estelle W. Byrum appeal.

*Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Robert G. Webb, for plaintiff appellee.*

*Pritchett, Cooke & Burch, by W. W. Pritchett, Jr., for defendant appellants.*

*Charles W. Ogletree, for defendant appellants.*

JOHNSON, Judge.

In defendants' sole Assignment of Error, they contend the court committed reversible error by ruling that the expert testimony of Jack A. Williford was inadmissible for the purpose of establishing fair market value of the land at issue. Specifically, defendants contend that the capitalization of income approach utilized by Mr. Williford as his method of appraisal is a proper method in determining fair market value in condemnation cases. We disagree and find defendants' reliance upon two recent decisions from this Court, *Raleigh-Durham Airport Authority v. King*, 75 N.C. App. 121, 330 S.E. 2d 618 (1985), and *Raleigh-Durham Airport Authority v. King*, 75 N.C. App. 57, 330 S.E. 2d 622 (1985), misplaced.

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Dept. of Trans. v. Byrum

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The two *Raleigh-Durham Airport Authority* cases are inapposite. In *Raleigh-Durham Airport Authority v. King*, 75 N.C. App. 121, 330 S.E. 2d 618, 3.6 acres were at issue. Improvements included the Kings' home, a frame office structure, and a parking lot with room for approximately fifty-five automobiles, with maximum capacity for 200 automobiles during holiday seasons. In 1983, the parking business earned \$57,000.00 gross income for ten months of operation. The rate charged was \$2.50 per day per vehicle. The trial judge allowed Mrs. King to testify regarding the parking revenues after characterizing them as "rentals." This Court found no error in the court's finding this evidence admissible. In so ruling this Court cited two North Carolina Supreme Court cases, *State Highway Commission v. Phillips*, 267 N.C. 369, 148 S.E. 2d 282 (1966), and *Kirkman v. State Highway Commission*, 257 N.C. 428, 126 S.E. 2d 107 (1962). Both of these cases distinguish loss of profits or injury to a business from the rental value of property. *Phillips, supra*, at 373, 148 S.E. 2d at 285; *Kirkman, supra*, at 432, 126 S.E. 2d at 110. Loss of profits are not elements of recoverable damages in an award for a taking under the power of eminent domain. *Phillips, supra*; *Kirkman, supra*. "When rental property is condemned the owner may not recover for lost rents, but rental value of property is competent upon the question of the fair market value of the property at the time of the taking." *Kirkman, supra*, at 432, 126 S.E. 2d at 110.

In the present case defendants could have offered evidence of the rents received from the campground rental business, but they did not attempt to do so. The excluded testimony was for the loss of profits for all the businesses—the restaurant, the game room and the campground—as indicated by income tax returns for 1982, 1983 and 1984. No evidence was presented in an attempt to separate rental income from the campground from the other businesses, or to show the rate of rent charged per vehicle, as was done in the *Raleigh-Durham Airport Authority* case.

Defendants also rely on *Raleigh-Durham Airport Authority*, 75 N.C. App. 121, 330 S.E. 2d 618, as giving approval to the income method to determine fair market value, the method which defendants used in the case *sub judice*. In that decision, this Court acknowledged that the expert witness used two appraisal methods, the widely accepted comparable sales approach and the income approach. This Court allowed the expert's opinion regard-

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Dept. of Trans. v. Byrum

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ing the fair market value of \$429,000.00 because the expert said "my decision was that the value indicated by the comparable sales was the most probable value and that was my opinion of value." *Id.* at 125, 330 S.E. 2d at 620. In other words, this Court allowed the testimony because the expert's opinion was *not* based upon the income approach.

*Raleigh-Durham Airport Authority v. King*, 75 N.C. App. 57, 330 S.E. 2d 622 (1985), does not support defendants' position either. In that case the fair market value of a two-acre tract of land was at issue. Improvements included the defendants' home, a restaurant and country store combination that sold gasoline, and several outbuildings. The defendants leased their commercial facility. The plaintiff claimed it was reversible error to admit testimony of the fair market value "based upon capitalization of *hypothetical* income from *hypothetical* improvements to the property." *Id.* at 63, 330 S.E. 2d at 626 (emphasis in original). This Court stated, "Without expressing an opinion as to whether the capitalization of hypothetical income is a proper method of valuation, we hold that in the context of this case [the] expert testimony was properly received." *Id.* at 64, 330 S.E. 2d at 626. Defendants point to this case as not excluding the income method of valuation. It does not. Closer reading of the opinion reveals that in the passage quoted above, this Court was referring to *rental* income which, as stated previously, has long been an accepted consideration in arriving at fair market value of the property at the time of the taking. In conclusion, neither of these two decisions relied upon by defendants change the rule that lost profits and lost income cannot be considered in an award pursuant to a taking.

In *City of Kings Mountain v. Cline*, 19 N.C. App. 9, 198 S.E. 2d 64 (1973), this Court specifically found that it was error to admit testimony concerning the loss of profits and loss in gross receipts of a dairy business. *Id.* at 12, 198 S.E. 2d at 66. However, we are aware that there is a line of cases that appear to imply a different result. In *Board of Transportation v. Jones*, 297 N.C. 436, 255 S.E. 2d 185 (1979), our Supreme Court upheld the admission of a real estate appraiser's expert opinion as to the fair market value of the property at issue where this figure was based on the value of the part taken plus damage to the remainder. *Id.* at 439, 255 S.E. 2d at 188. The Court concluded that much more

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Dept. of Trans. v. Byrum

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latitude is accorded to the scope of testimony of the expert real estate appraiser to assess damages than is accorded to a judge or jury in deciding damages under G.S. 136-112(1). *Id.* at 438, 255 S.E. 2d at 187.

G.S. 136-112(1) provides, that the "commissioners, jury or judge" are restricted to "the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking. . . ." G.S. 136-112(1). The judge is required to instruct the jury to use the above standard—and that standard only—in computing damages. *Board of Transportation v. Jones, supra*, at 439, 255 S.E. 2d at 187. However, a real estate appraiser is given wide latitude regarding permissible bases for opinions on value. *Id.* at 438, 255 S.E. 2d at 187, citing *State Highway Commission v. Conrad*, 263 N.C. 394, 139 S.E. 2d 553 (1965). In *Department of Transportation v. McDarris*, 62 N.C. App. 55, 302 S.E. 2d 277 (1983), this Court held that the challenged testimony regarding damages was admissible and stated "the range of valuation methods available to experts is unlimited." *Id.* at 59, 302 S.E. 2d at 279 (where expert real estate appraiser testified to the amount of damages based in part on the cost of landfill material necessary to restore the property to its original condition). However, none of the cases in this line address testimony by a real estate appraiser regarding fair market value based on lost income. We hold that *City of Kings Mountain v. Cline, supra*, is controlling and the evidence of Jack A. Williford regarding the fair market value of the land at issue based on the lost business income was properly excluded. Therefore, judgment is

Affirmed.

Judges WEBB and WHICHARD concur.

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**Altman v. Munns**

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MARY ELAINE ALTMAN AND LISA ELAINE MUNNS v. ROBERT ALLEN MUNNS

No. 8610DC56

(Filed 15 July 1986)

**1. Husband and Wife § 12.1— separation agreement—college expenses—oral modification—absence of consideration**

Where a separation agreement required defendant father to pay for his daughter's college education but made no distinction between a private and a public college, allowing the daughter to attend a private college did not constitute additional consideration which would support an oral modification of the agreement providing for each parent to pay one-half of the daughter's college expenses. Nor was there detrimental reliance by defendant so that estoppel could be substituted as consideration.

**2. Husband and Wife § 11.1— breach of separation agreement—waiver of claim**

Plaintiff mother waived her claim for breach of a provision of a separation agreement requiring defendant father to pay their daughter's college expenses with respect to monies already paid by plaintiff pursuant to her oral agreement with defendant to pay half of the daughter's college expenses so the daughter could attend a private college.

APPEAL by defendant from *Cashwell, Judge*. Judgment entered 28 August 1985 in District Court, WAKE County. Heard in the Court of Appeals 9 May 1986.

Plaintiff Mary Elaine Altman and defendant Robert Allen Munns are the divorced parents of plaintiff Lisa Elaine Munns. On 16 March 1971, when Lisa was five years old, her parents entered into a separation agreement which provided, in part, that if Lisa or her younger sister continued their education beyond high school, the defendant agreed to pay the costs of the college education, plus a reasonable living allowance. Defendant's liability for college expenses was limited to four academic years for each child.

Plaintiff Lisa Elaine Munns began attending college in the 1983-84 academic year. For various reasons, she had decided to attend Louisburg College. Defendant had discussed with plaintiff Altman the need for financial assistance if their daughter attended a private school rather than a public institution. After investigating various options for financing Lisa's college education, defendant decided, and plaintiff Altman agreed, that a guaranteed

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Altman v. Munns

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student loan would be the best way to finance Lisa's education. The parents agreed that each would pay half of the payments when they became due and plaintiff Altman also agreed to pay half the other expenses. Defendant applied for the loan because plaintiff Altman told him that her assets and income would disqualify Lisa from receiving the loan. Lisa received the GSL and her parents each paid half of the remaining expenses, about \$815 each for the year, and defendant gave her an additional \$150 per month allowance.

Lisa attended summer school in 1984, and each parent again paid one-half the cost, with defendant continuing the additional \$150 per month allowance. In July 1984 plaintiff Altman told defendant she would not allow Lisa to apply for a GSL unless defendant would give her some sort of written guarantee that he would make all payments. Plaintiff Altman further told defendant she would not continue to pay half of Lisa's expenses. Defendant would not give such a guarantee, and Lisa did not receive a loan for 1984-85. Instead, for the 1984-85 academic year, plaintiff Altman paid all expenses for the fall semester, or \$2116.00, and defendant paid all expenses for the spring semester, or \$2060.00, in addition to continuing the \$150/month allowance.

Plaintiffs filed this action in October 1984, seeking an order that defendant be required to specifically perform the provision of the 1971 Separation Agreement relating to the funding of the children's college education. Plaintiffs also sought recovery of the amount plaintiff Altman had already paid, and the amount of the loan.

Defendant answered, asserting that his subsequent agreement with Mrs. Altman constituted a modification of their earlier contract, the separation agreement. Defendant also contended that plaintiffs, by accepting one-half payments for Lisa's first year, waived enforcement of the separation agreement and, further, that the action was barred by laches.

The parties waived jury trial, and Judge Cashwell heard the evidence. He concluded that there was no effective modification of the separation agreement and that there had been no waiver. Accordingly, he entered judgment for plaintiff Altman for \$3110.96, representing the amount she had already paid toward Lisa's education. He also entered judgment for plaintiff Munns for \$2270.04,

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**Altman v. Munns**

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representing the amount due on her Guaranteed Student Loan. Further, Judge Cashwell found the remedy at law to be inadequate and ordered defendant to specifically perform the provision of the 1971 Separation Agreement relating to college expenses. Defendant appeals.

*George R. Barrett for plaintiffs-appellees.*

*Donald H. Solomon; and Leigh L. Leonard, for defendant-appellant.*

PARKER, Judge.

Appellant contends that the facts as found by the trial judge do not support the conclusions of law and, in fact, compel the opposite conclusions. The facts were not in dispute and the trial judge found them essentially as outlined above. From these facts, the trial court concluded:

(5) The Defendant has breached the terms of the Separation Agreement and is indebted to the Plaintiff, Mary Elaine Altman, in the sum of \$3,110.96, and is indebted to the Plaintiff, Lisa Elaine Munns, in the amount of \$2,270.04.

(6) The Plaintiff, Mary Elaine Altman's, acceptance of a fait accompli in her agreement to and payment of one-half of the 1983-1984 fees and costs for Lisa Elaine Munns' education, did not constitute a novation or modification of the Defendant's obligations under the terms of the Separation Agreement.

[1] Defendant argues that he and Mrs. Altman reached an oral modification of their separation agreement as it related to the payment of Lisa's college expenses. The terms of the modified contract, asserted by defendant, are that each of Lisa's parents would pay one-half the expenses of Lisa attending a private college. In addition, defendant would pay Lisa a \$150.00 per month allowance.

Under North Carolina law, a separation agreement may provide for the support of the children of the marriage after they reach majority. *Shaffner v. Shaffner*, 36 N.C. App. 586, 244 S.E. 2d 444 (1978). The most common of these provisions is one providing for the payment of college expenses of the children. *See*



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Altman v. Munns

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generally 2 Lee, *North Carolina Family Law*, § 151 (1980). Ordinary contract law applies in interpreting such provisions. *Shaffner*, *supra*.

The 1971 Separation Agreement provided that:

. . . if either of said children shall continue her education beyond secondary school at the college level or at a vocational or similar school, the Husband agrees to pay the costs of such education, including board, tuition, living and clothing allowance, and a reasonable amount for books, laboratory fees and similar items. Notwithstanding the foregoing, the Husband's obligations for the college or vocational education of any such child shall not extend over more than four academic years for each said child.

There was no clause relating to the selection of a college, nor was there any requirement that the children attend a public college.

For there to be an effective parol modification of a written contract, all the requisites of a contract must be met. *Yamaha Intern. Corp. v. Parks*, 72 N.C. App. 625, 325 S.E. 2d 55 (1985). The critical elements are mutual assent to the modification, and consideration or a substitute supporting it. *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 323 S.E. 2d 23 (1984). The testimony of Mrs. Altman at the hearing shows her assent to the modification. She testified that she "realized Louisburg College was more expensive. I felt sorry for Bob and therefore I agreed to pay one-half of Lisa's college expenses."

Contrary to defendant's assertions, however, allowing Lisa to attend a private college does not constitute the additional consideration necessary to find a modification. Defendant was bound by the separation agreement to pay for his children's college expenses. No distinction was made between a private or public college. Defendant's pre-existing duty to pay for his daughters' college educations could not also be the additional consideration necessary to a modification. 17 Am. Jur. 2d, *Contracts*, § 119 (1964). For the same reason, there was no detrimental reliance on the part of defendant, a necessary element for estoppel to be substituted as consideration. *Restatement (Second) of Contracts*, § 90 (1981). A party cannot be said to have relied to his detriment by performing that which he was originally bound to perform. *Id.*,

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**Altman v. Munns**

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§ 92. Defendant's arguments that there was an accord and satisfaction or that the claim is barred by laches are similarly unavailing.

[2] However, in our view, with respect to the payments for the 1983-84 academic year and summer school, plaintiff Altman has waived her claim for breach of contract by her actions subsequent to her discussion with defendant about financing their daughter's education. A party may waive the breach of a contractual provision without consideration or estoppel where (i) the waiving party is the non-breaching party; (ii) the breach is not a total repudiation of the contract so that the non-breaching party continues to receive some benefit of the contract; (iii) the innocent party is aware of the breach; and (iv) the innocent party performs or accepts the partial performance of the breaching party. *Wheeler v. Wheeler*, 299 N.C. 633, 263 S.E. 2d 763 (1980). Plaintiff Altman contends that there can be no waiver when the innocent party is acting under duress or undue influence. *See id.* However, Mrs. Altman testified that she agreed to the modification because "she felt sorry for Bob, not because she felt pressured or coerced in any way." This evidence shows that there was no undue influence. The parties were divorced, and no longer stood in a fiduciary relationship. Further, Mrs. Altman was aware of the terms of the separation agreement, and nothing prevented her from enforcing those terms instead of agreeing to pay one-half their daughter's expenses.

The person for whose benefit anything is to be done may waive strict performance of the contract by dispensing with any part of the contract or circumstance in the mode of performance. *Lithographic Co. v. Mills*, 222 N.C. 516, 23 S.E. 2d 913 (1943). A person may waive performance by saying that he dispenses with it or by conduct which naturally and justly leads the other party to believe that he dispenses with it. *Wade Mfg. Co. v. Lefkowitz*, 204 N.C. 449, 168 S.E. 517 (1933). In the instant case, the trial judge found that Mrs. Altman agreed to pay half the daughter's college expenses and half the payments on the student loan when due. Having voluntarily paid that which she knew defendant was obligated to pay, Mrs. Altman has waived her right to enforce the contract as to those monies. Mrs. Altman's conduct was positive, unequivocal and inconsistent with the terms of the separation

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In re Petition of Kermit Smith

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agreement. See *Singleton v. Atlantic Coast Line R.R.*, 203 N.C. 462, 166 S.E. 305 (1932).

With respect to plaintiff Munns, her benefit under the separation agreement was to have a four-year college education paid in full. Since plaintiff Altman's waiver did not affect this right and since there has been no breach of the contract as to her, plaintiff Munns' action was premature and entry of judgment in her favor was error.

We hold that the trial court erred in entering judgment for plaintiff Altman for the amount expended by her for Lisa's 1983-84 academic year and in entering judgment for plaintiff Munns for the amount of the loan. Plaintiff Altman is entitled to recover only the amount she expended for Lisa's 1984-85 academic year and to enforcement of the separation agreement for subsequent years. Plaintiff Altman and defendant are each obligated to pay one-half the student loan obtained by plaintiff Munns when the payments become due under the terms of the note and defendant is obligated to repay plaintiff Altman the amount she paid for the fall semester of Lisa Munns' second academic year at Louisburg College. The judgment of the trial court is

Reversed in part and affirmed in part.

Judges PHILLIPS and MARTIN concur.

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IN RE: PETITION OF KERMIT SMITH

No. 8610SC29

(Filed 15 July 1986)

**Convicts and Prisoners § 2; Constitutional Law § 23.1—prisoners—confiscation of excess money—no due process violation**

The trial court erred by holding that the confiscation under N.C.G.S. § 148-18.1 of excess funds found in the possession of an inmate was unconstitutional. N. C. prison regulations governing disciplinary proceedings meet minimum procedural due process requirements and satisfy the requirement for a hearing prior to the deprivation of property, and a valid State objective, maintenance of order and security, is met by the statute and regulations. 5 NCAC 2F .0503(a)(2), 5 NCAC 2F .0504(b)(3), 5 NCAC 2B .0302, Fourteenth

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**In re Petition of Kermit Smith**

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Amendment to the United States Constitution, Art. I, § 19 North Carolina Constitution.

APPEAL by respondent from *Bailey, Judge*. Order entered 19 September 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 7 May 1986.

Petitioner Kermit Smith, an inmate in the custody of the North Carolina Department of Correction, petitioned pursuant to G.S. 148-113 for judicial review of four decisions of the Inmate Grievance Commission, three of which are not relevant to the issue raised by this appeal. Events giving rise to the petition are summarized as follows:

On 1 October 1983, during a routine search, petitioner was found to be in possession of funds in excess of those which inmates are permitted by prison regulations to retain in their personal possession. He was charged with a minor offense, pleaded guilty, and was found guilty. As punishment, certain of his privileges were suspended for one week. Upon completion of the disciplinary proceedings, the excess funds were deposited in the Inmate Welfare Fund, maintained for the benefit of all prisoners, as provided by G.S. 148-18.1 and prison regulations.

Petitioner filed a grievance with the Inmate Grievance Commission alleging a violation of his constitutional rights and requesting that the confiscated funds be returned to him. The Commission dismissed the grievance, concluding that the proper forum to test the constitutionality of G.S. 148-18.1 and the applicable prison regulation was either the state or federal courts. Petitioner then sought judicial review of that decision.

After hearing the matter, the trial court held that G.S. 148-18.1 authorized the taking of property without due process of law and was therefore unconstitutional. The court ordered that respondent Department of Correction restore the confiscated funds to petitioner by depositing them in his Inmate Trust Fund Account. Respondent appeals.

*Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Jacob Safron and Assistant Attorney General James Peeler Smith for respondent appellant.*

*North Carolina Prisoner Legal Services, Inc., by Michael S. Hamden, for petitioner appellee.*

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*In re* Petition of Kermit Smith

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MARTIN, Judge.

The only issue involved in this appeal is the constitutionality of G.S. 148-18.1. We hold the statute constitutional and reverse the decision of the trial court.

G.S. 148-18.1, ratified 9 May 1983 and effective on and after that date, provides:

Any item of personal property which a prisoner in any correctional facility is prohibited from possessing by State law or which is not authorized by rules adopted by the Secretary of Correction shall, when found in the possession of a prisoner, be confiscated and destroyed or otherwise disposed of as the Secretary may direct. Any unauthorized funds confiscated under this section or funds from the sale of confiscated property shall be deposited to Inmate Welfare Fund maintained by the Department of Correction.

Prison regulations provide for limitations on the amount and denominations of funds which an inmate may possess at any time, 5 NCAC 2F .0503(a)(2), for confiscation of unauthorized funds and their deposit into the Inmate Welfare Fund, 5 NCAC 2F .0504 (b)(3), and that possession of funds in excess of the authorized amount, or in a form other than that permitted, shall constitute a disciplinary offense, 5 NCAC 2B .0302.

Petitioner attacks the statute and regulations as violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Law of the Land Clause of Article I, Section 19 of the Constitution of North Carolina. Our Supreme Court has held that the term "law of the land," as used in Article I, Section 19 of the North Carolina Constitution, is synonymous with "due process of law" as that term is applied under the Fourteenth Amendment to the United States Constitution. *In re Moore*, 289 N.C. 95, 221 S.E. 2d 307 (1976).

In support of his contention, petitioner relies heavily upon the decision of the Eighth Circuit Court of Appeals in *Sell v. Parrott*, 548 F. 2d 753 (8th Cir.), *cert. denied*, 434 U.S. 873, 54 L.Ed. 2d 152, 98 S.Ct. 220 (1977). In *Sell*, plaintiffs were inmates at a Nebraska prison and were found in possession of currency. The possession of any currency was an infraction of prison rules. The money was immediately confiscated and deposited in the inmate

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In re Petition of Kermit Smith

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welfare fund without any hearing, and plaintiffs were additionally punished, apparently without a hearing. Nebraska had no statute similar to G.S. 148-18.1, authorizing forfeiture of unauthorized funds.

The Court held that the actions of the prison administrators, by prescribing and enforcing the forfeiture of property as a punitive measure, were violative of the due process clause of the Fourteenth Amendment, *in the absence of underlying statutory authority for such forfeitures*. The Court went on to say

we do not hold that a state legislature may not constitutionally provide by statute that such money shall be permanently confiscated, provided that the forfeiture proceedings are surrounded by adequate procedural safeguards, and provided that inmates who are found with money in their possession are given some opportunity to justify their possession notwithstanding their apparent violation of prison rules.

*Id.* at 759.

In *Hanvey v. Blankenship*, 474 F. Supp. 1349 (W.D. Va. 1979), *aff'd per curiam*, 631 F. 2d 296 (4th Cir. 1980), the petitioner inmate sought the return of currency confiscated when he was found in possession of it contrary to prison rules. The district court held, following the logic of *Sell*, that Virginia statutes conferred the power upon prison authorities to prohibit inmates from possessing items of contraband property, to confiscate those items, and to apply the proceeds thereof for the benefit of all prisoners. No violation of petitioner's constitutional rights was found. On appeal, the Fourth Circuit Court of Appeals affirmed, saying "[w]hen statutory authority permits a forfeiture such as this one, no constitutional violation occurs." 631 F. 2d at 297.

G.S. 148-18.1 is modeled upon the Virginia statute upheld in *Hanvey*. See Va. Code Ann. § 53-23.1 (Repl. Vol. 1978), recodified as § 53.1-26 (Repl. Vol. 1982). We hold that G.S. 148-18.1 and the Department of Correction regulations implementing the statute provide the procedural safeguards referred to in *Sells*, *supra*, and meet substantive due process requirements.

The term "due process of law" signifies dual components; it relates to both procedural and substantive law. *Moore, supra*. Procedural due process means notice and an opportunity to be

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In re Petition of Kermit Smith

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heard and to defend in an orderly proceeding, while substantive due process denotes a standard of reasonableness and limits a state's exercise of its police power. *Id.* at 95, 221 S.E. 2d at 307. "The traditional substantive due process test has been that a statute must have a rational relation to a valid state objective." *Id.* at 101, 221 S.E. 2d at 311.

Minimum procedural due process requirements for prison disciplinary proceedings were delineated by the United States Supreme Court in *Wolff v. McDonnell*, 418 U.S. 539, 41 L.Ed. 2d 935, 94 S.Ct. 2963 (1974). The inmate must be provided with advance written notice of the violation with which he is charged and at least a brief period in which to prepare his defense; he should be permitted to call witnesses and present documentary evidence in his defense so long as it will not pose an undue hazard to prison security or correctional goals to permit him to do so; and he must be provided with a written statement by the fact finders as to the evidence relied upon and the reasons for any disciplinary actions taken. North Carolina prison regulations governing disciplinary proceedings meet these minimum procedural due process requirements, *see* 5 NCAC 2B .0201 *et seq.*, and satisfy the requirement for a hearing prior to deprivation of property. 5 NCAC 2F .0503(2) and .0504(b) implement the authority extended to prison officials by G.S. 148-18.1 by providing for the confiscation and deposit into the Inmate Welfare Fund of prohibited currency only if disciplinary proceedings are initiated in accordance with prison regulations 5 NCAC 2B .0201 *et seq.*

The provisions of G.S. 148-18.1 and the related Department of Correction regulations also satisfy substantive due process requirements. Unquestionably, the Department of Correction has a legitimate interest in limiting the amount of currency which an inmate may possess.

It has long been prison policy to prohibit inmates from having in their possession what is called "free world" or "green" money. The reasons for the prohibition are obvious. An inmate with currency in his possession may be the subject of attack by other inmates; an inmate with funds is in a better position to escape than an inmate who has no money; the money in the possession of an inmate may be used to bribe guards or other prison employees.

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**Flaherty v. Hunt**

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*Sell v. Parratt, supra* at 756, quoting *Holt v. Hutto*, 363 F. Supp. 194, 210 (E.D. Ark. 1973), *rev'd on other grounds, Finney v. Arkansas Board of Correction*, 505 F. 2d 194 (8th Cir. 1974). Thus, a valid State objective, i.e., the maintenance of order and security within the State's penal institutions, is met by the statute and regulations.

For the foregoing reasons, we hold that G.S. 148-18.1 and the regulations of the North Carolina Department of Correction which implement the statute do not violate petitioner's rights under the Fourteenth Amendment to the Constitution of the United States or the Law of the Land Clause of Article I, Section 19 of the North Carolina Constitution. The order of the trial court holding to the contrary is reversed.

Reversed.

Judges PHILLIPS and PARKER concur.

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DAVID T. FLAHERTY AND TOM HANNON v. JAMES B. HUNT, JR. AND  
JAMES G. MARTIN, GOVERNOR

No. 8510SC818

(Filed 15 June 1986)

**1. Appeal and Error § 6— interlocutory order—issue of public importance—consideration of appeal on merits**

The appellate court exercised its discretion to determine on the merits an appeal from an interlocutory order denying a motion to dismiss for failure to state a claim where a decision of the principal question presented would expedite the administration of justice and the case involves a legal issue of public importance.

**2. Public Officers § 10— former governor—alleged misuse of State aircraft—no right of action by taxpayers**

Citizens and taxpayers have no standing to bring an action against a former governor to recover damages for the alleged misuse of State aircraft while in office, the exclusive right to bring such an action having been given to the Attorney General by N.C.G.S. § 143-32.

APPEAL by defendant from *Bailey, Judge*. Judgment entered 20 March 1985 in WAKE County Superior Court. Heard in the Court of Appeals 10 March 1986.



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Flaherty v. Hunt

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The pertinent procedural history of this case shows that plaintiffs, citizens and taxpayers, brought this action seeking injunctive relief and monetary damages against defendant Hunt for wrongful use of State property while Hunt was serving as Governor. Plaintiffs alleged, *inter alia*, that Hunt had used State-owned aircraft for political campaign purposes without properly reimbursing the State for the use of the aircraft. Defendant Hunt answered, denying the essential allegations in plaintiffs' complaint and moved to dismiss for failure to state a claim upon which relief could be granted. Plaintiffs subsequently voluntarily dismissed their claim for injunctive relief, leaving only their claim for monetary damages. After defendant Hunt left office, James G. Martin, now Governor, was added as a party defendant.

Defendant Hunt's motion to dismiss was denied by Judge Bailey and defendant Hunt appealed to this Court. Subsequently, plaintiffs have moved this Court to dismiss Hunt's appeal as being interlocutory.

*Harrell, Titus & Wright, by Richard C. Titus, for plaintiffs-appellees.*

*Kirby, Wallace, Creech, Sarda & Zaytoun, by John R. Wallace; and Kimzey, Smith, McMillan & Roten, by Russell W. Roten, for defendant-appellant.*

WELLS, Judge.

[1] The threshold question we must decide is whether this appeal should be dismissed. Ordinarily, a denial of a N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) motion to dismiss for failure to state a claim is an interlocutory order from which no immediate appeal may be taken. *State v. School*, 299 N.C. 351, 261 S.E. 2d 908, *aff'd on rehearing*, 299 N.C. 731, 265 S.E. 2d 387, *appeal dismissed*, 449 U.S. 807, 101 S.Ct. 55, 66 L.Ed. 2d 11 (1980); *Raines v. Thompson*, 62 N.C. App. 752, 303 S.E. 2d 413 (1983) and cases cited therein. This is because no final judgment is involved in such a denial and the movant is not deprived of any substantial right that cannot be protected by a timely appeal from a final judgment which resolves the controversy on its merits. *State v. School, supra*. Nevertheless, where a decision of the principal question presented would expedite the administration of justice, *Stanback v. Stanback*, 287 N.C. 448, 215 S.E. 2d 30 (1975); *Consumers Power v.*

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Flaherty v. Hunt

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*Power Co.*, 285 N.C. 434, 206 S.E. 2d 178 (1974), or where the case involves a legal issue of public importance, *Moses v. Highway Commission*, 261 N.C. 316, 134 S.E. 2d 664, *cert. denied*, 379 U.S. 930, 85 S.Ct. 327, 13 L.Ed. 2d 342 (1964), appellate courts may exercise their discretion to determine such an appeal on its merits. This is an appropriate case for the exercise of such discretion. We therefore deny plaintiffs' motion to dismiss the appeal and proceed to a determination on the merits.

[2] This action being one by citizens and taxpayers to recover monetary damages from a State officer for misuse of State property while in office, the dispositive question to be decided is whether this State recognizes or should allow such an action to be maintained. We answer that question in the negative and reverse the judgment of the trial court.

Our Supreme Court has historically recognized two forms or types of taxpayer actions against public officers or officials: one, actions for injunctive relief against both State and local officers, and two, actions to recover funds wrongfully expended or received by local officers. Cases typical under category one are: *Hughey v. Cloninger*, 297 N.C. 86, 253 S.E. 2d 898 (1979), an action to restrain county officers from using public funds for support of a non-public school for dyslexic children; *Lewis v. White*, 287 N.C. 625, 216 S.E. 2d 134 (1975), an action to restrain the construction of the State Art Museum; *Styers v. Phillips*, 277 N.C. 460, 178 S.E. 2d 583 (1971), an action to enjoin use of public funds for busing municipal school students; *Rider v. Lenoir County*, 236 N.C. 620, 73 S.E. 2d 913 (1953), an action to restrain use of public funds to construct a hospital; *Teer v. Jordan*, 232 N.C. 48, 59 S.E. 2d 359 (1950), an action to restrain use of State road bond funds for purchase of road building machinery; *Hinton v. State Treasurer*, 193 N.C. 496, 137 S.E. 669 (1927), an action to restrain issuance of Veteran's Loan Fund bonds.

Examples of cases under the second category are: *Horner v. Chamber of Commerce*, 231 N.C. 440, 57 S.E. 2d 789 (1950), an action to recover municipal funds unlawfully paid to a chamber of commerce; *Hill v. Stansbury*, 223 N.C. 193, 25 S.E. 2d 604 (1943), an action to recover salary paid to a county treasurer; *Moore v. Lambeth*, 207 N.C. 23, 175 S.E. 714 (1934), an action to recover municipal funds expended for repair to a city incinerator; *Brown*

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Flaherty v. Hunt

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*v. R.R.*, 188 N.C. 52, 123 S.E. 633 (1924), an action to recover municipal funds used to purchase railroad right-of-way; *Waddill v. Masten*, 172 N.C. 582, 90 S.E. 694 (1916), an action to recover fees collected by a register of deeds. We note that since the enactment of Chapter 80 of the Public Laws of North Carolina in 1913, formerly Consolidated Statute 3206, now codified as N.C. Gen. Stat. § 128-10 (1981), such actions against municipal officers are statutory, the statute providing the basis for the action as well as procedural requirements. N.C. Gen. Stat. § 128-10 reads as follows:

*Citizens to recover funds of county or town retained by delinquent official.* When an official of a county, city or town is liable upon his bond for unlawfully and wrongfully retaining by virtue of his office a fund, or a part thereof, to which the county, city or town is entitled, any citizen and taxpayer may, in his own name for the benefit of the county, city or town, institute suit and recover from the delinquent official the fund so retained. Any county commissioners, aldermen, councilmen or governing board who fraudulently, wrongfully and unlawfully permit an official so to retain funds shall be personally liable therefor; any citizen and taxpayer may, in his own name for the benefit of the county, city or town, institute suit and recover from such county commissioners, aldermen, councilmen, or governing board, the fund so retained. Before instituting suit under this section, the citizen and taxpayer shall file a statement before the county commissioners, treasurer, or other officers authorized by law to institute the suit, setting forth the fund alleged to be retained or permitted to be retained, and demanding that suit be instituted by the authorities authorized to sue within 60 days. The citizen and taxpayer so suing shall receive one-third part, up to the sum of five hundred dollars (\$500.00), of the amount recovered, to indemnify him for his services, but the amount received by the taxpayer and citizen as indemnity shall in no case exceed five hundred dollars (\$500.00).

We have found no case in which our appellate courts have recognized the right of a taxpayer to sue a *State* officer or official for monetary damages for the wrongful or unlawful use or disposition of State funds or property. On the other hand, the General Assembly has established a statutory method for addressing such

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**Flaherty v. Hunt**

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problems through the enactment of N.C. Gen. Stat. § 143-32 (1983) which reads as follows:

*Person expending an appropriation wrongfully.* (a) Any trustee, director, manager, building committee or other officer or person connected with any institution, or other State agency as herein defined to which an appropriation is made, who shall expend any appropriation for any purpose other than that for which the money was appropriated and budgeted or who shall consent thereto, shall be liable to the State of North Carolina for such sum so spent and the sum so spent, together with interest and costs, shall be recoverable in an action to be instituted by the Attorney General for the use of the State of North Carolina, which action may be instituted in the Superior Court of Wake County, or any other county, subject to the power of the court to remove such action for trial to any other county, as provided in G.S. 1-83, subdivision (2).

(b) Any member or members of any board of trustees, board of directors, or other controlling body governing any of the institutions of the State, or any officer, employee of, or person holding any position with any of the institutions of the State, or other State agency as herein defined, who willfully acts to divert, use, or expend any funds appropriated for the use of said institution or agency, in a manner designed to circumvent the provisions of this section, including normal reversions of State funds, by failing to properly receive or deposit funds, or by the improper expenditure or transfer of funds for any purpose other than that for which the funds were appropriated and budgeted, shall be guilty of a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court. All offenses against this section shall be held to have been committed in the County of Wake and shall be tried and disposed of in the General Court of Justice for Wake County. If such offender be not an officer elected by vote of the people, conviction of such offense shall be sufficient cause for removal from office or dismissal from employment by the Governor upon 30 days' notice in writing to such offender.

We hold that this statute provides the explicit and exclusive remedy for the recovery of damages alleged to have occurred as a

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State v. Poole

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result of the alleged misuse of State aircraft by defendant Hunt in this action and that therefore plaintiffs lack standing to bring this action.

Plaintiffs cite authority from other states in support of their argument that we should recognize their right to bring this action. Such authority is unpersuasive in the light of the judgment of our General Assembly that in this State, the Attorney General is the proper person to pursue such a remedy on behalf of taxpayers and the State. Neither are we persuaded by plaintiffs' argument that since the General Assembly has provided for such taxpayer actions against local officials, reason requires us to recognize such an action against State officers. These are matters appropriate for legislative determination and not for our decision. In settling the record on appeal in this case, Judge Bailey made it clear that in denying defendant Hunt's Rule 12(b)(6) motion he considered *only* the pleadings and the record proper. The trial court did not consider nor do we consider any question concerning plaintiffs' remedies, if any, with respect to seeking or obtaining action by the Attorney General concerning the matters asserted by plaintiffs in their complaint.

For the reasons stated, the judgment of the trial court is reversed and this cause is remanded for entry of judgment dismissing plaintiffs' complaint.

Reversed and remanded.

Chief Judge HEDRICK and Judge MARTIN concur.

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STATE OF NORTH CAROLINA v. STEPHEN ANDREW POOLE

No. 8630SC117

(Filed 15 July 1986)

**1. Assault and Battery § 14.3— circumstantial evidence— evidence sufficient**

The trial court did not err by denying defendant's motion to dismiss an assault charge where it would be reasonable to infer that defendant committed the assault based on defendant's statement that the charge represented his first violent act; the consistency of the characteristics of the bullet that injured the victim and a test round fired from defendant's gun; the tire prints found at

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**State v. Poole**

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the storage yard placing defendant's truck at the scene of the larceny; the testimony of a witness to the assault who observed two men fighting in front of a truck, trailer, and tractor immediately following the time the larceny occurred; and defendant's possession of the stolen tractor found with his truck and trailer hours after the assault.

**2. Criminal Law § 138.21— assault—especially heinous, atrocious or cruel—evidence sufficient**

The evidence justified a sentence in excess of the presumptive term for assault where the victim was beaten, shot in the back of the head, driven over by a car, and left on the highway with his leg caught underneath the car.

APPEAL by defendant from *Grist, Judge*. Judgment entered 13 May 1985 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 5 June 1986.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Philip A. Telfer, for the State.*

*Smith, Bonfoey and Queen, by Frank G. Queen, and Hyler, Smathers and Davis, by Patrick U. Smathers, for defendant appellant.*

BECTON, Judge.

Defendant, Stephen Andrew Poole, was convicted in a jury trial of felonious larceny and assault with a deadly weapon with intent to kill inflicting serious injury. He received a fifteen year sentence on the assault conviction and three years, consecutive, on the larceny conviction. Defendant brings this appeal to have the assault charge dismissed, or in the alternative, to have the case remanded for a new sentencing hearing.

The issues on appeal are whether the evidence sufficiently implicated the defendant to submit the assault case to the jury, and whether the trial court properly concluded that the assault was especially heinous, atrocious or cruel to justify a sentence in excess of the presumptive term. We find no error.

I

The victim, Kent Plemmons, drove his Thunderbird to Plemmons Plumbing and Heating around 8:15 p.m. on the night of the larceny and assault. He remembers none of the later events of that evening due to amnesia resulting from his injuries. Later that night Plemmons was found on a highway approximately 4,400

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*State v. Poole*

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feet from Plemmons Plumbing underneath his car, with a gunshot wound in the back of the head.

Between 8:00 and 8:30 p.m., a passing motorist, Larry Young, observed a Thunderbird stopped in front of a truck with a trailer and tractor. Young saw two men on the ground fighting in front of the Thunderbird; the man on the top was repeatedly hitting the man on the bottom on the forehead. Young was unable to describe either man. He heard what sounded like a shot, doubled back on a service road, and met the same truck with trailer and tractor at an intersection. When he returned to the scene, the Thunderbird had been moved to face the curb and a body was underneath the car. When John and Effie Yarborough passed the truck and car, a body was lying in front of the vehicles. When they returned, the Thunderbird was pulled up to face the curb. Elaine Rogers passed the Plemmons' Thunderbird as a reddish truck with a trailer was pulling away. Rogers stopped and found the car pulled into the curb over a body with the car engine running.

In the early morning following the assault defendant was found asleep in a bronze Dodge pickup truck with a trailer carrying the tractor belonging to Plemmons Plumbing. The tractor had last been seen the day before around 7:00 p.m. The tractor starter switch had been straight-wired. Defendant asked the arresting officer, "What is all this about?", to which the officer responded, "I think you know what it is about." Defendant replied, "Yeah, I do." While in jail awaiting trial, defendant told the chief jailer that the charge was "the first time that I have ever done anything violent in my life."

A .38 caliber pistol was in the glove compartment of the truck and defendant had four unspent .38 caliber bullets in his pocket. While the bullet taken from the victim had similar characteristics to a test round fired from defendant's gun, ballistics experts could not determine whether the gun had fired the bullet injuring the victim. Investigators found tire marks made by defendant's truck in the storage yard at Plemmons Plumbing where the tractor was last seen. Boots found in the back of defendant's pickup could have made boot impressions found at the storage yard, but this connection could not be conclusively made.

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State v. Poole

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## II

[1] To properly deny a defendant's motion to dismiss at the close of the evidence there must be "substantial evidence" of each element of the offense charged and of defendant's being the perpetrator of the offense. *State v. Powell*, 299 N.C. 95, 98, 261 S.E. 2d 114, 117 (1980). Evidence which raises a suspicion as to the identity of the defendant as the perpetrator is not sufficient to create a jury question, even if this suspicion is strong. *Powell*. Regardless of whether the evidence presented is direct, or, as in this case, circumstantial, the test for sufficiency to withstand the motion to dismiss is whether a *reasonable inference* of defendant's guilt may be drawn from the circumstances. *Powell*.

We find that the trial court properly denied defendant's motion to dismiss as there was sufficient evidence to allow a reasonable inference that the defendant was Plemmons' assailant. It is immaterial that any piece of circumstantial evidence considered alone is insufficient to establish the identity of the perpetrator. *State v. Ledford*, 315 N.C. 599, 340 S.E. 2d 309 (1986). The chain of circumstantial evidence may be sufficient to submit the case to the jury. *State v. Rowland*, 263 N.C. 353, 139 S.E. 2d 661 (1965). A common thread running through all the evidence in the case at bar is the Dodge Ram truck: defendant was known to drive the truck prior to the assault, tire print evidence placed defendant's truck at Plemmons' storage yard, a small truck carrying a tractor was at the scene during the assault, and defendant was found in his truck the following morning in possession of the stolen tractor.

The time sequence and the proximity of the events are evidence that the same person committed both the larceny and the assault. The tractor was last noticed at Plemmons Plumbing around 7:00 or 7:15 p.m., the victim arrived at Plemmons Plumbing at 8:15 p.m., then a witness saw a man being attacked alongside a truck and tractor between 8:00 and 8:30 p.m. approximately 4,400 feet from Plemmons Plumbing. Evidence must be viewed in the light most favorable to the State by the court ruling on the motion to dismiss. *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978). Viewed in the light most favorable to the State, defendant's comment that the charge against him "was the first time I have ever done anything violent in my life" implicates him in the



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State v. Poole

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assault rather than just the larceny. It is left to the jury to determine the weight to accord to this bit of evidence. The trial court is *not* required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant's motion to dismiss. *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981).

When the evidence strongly suggests that "all the crimes including the larceny occurred as a part of the same criminal enterprise" by the same assailant, a defendant's recent possession of stolen property is a relevant consideration in determining whether the defendant is guilty of all the crimes charged against him. *State v. Joyner*, 301 N.C. 18, 29, 269 S.E. 2d 125, 132 (1980). Defendant was in possession of the stolen tractor at 3:30 a.m. of the morning following the larceny and assault. "Whenever goods have been taken as a part of the criminal act, the fact of subsequent possession is some indication that the possessor was the taker, and therefore the doer of the whole crime." 1 *Wigmore on Evidence* Sec. 153 (3d Ed. 1940); *State v. Mercer*, 317 N.C. 87, 343 S.E. 2d 885 (1986).

This is not a case in which the jury must pile inference upon inference in order to convict the defendant. *See Mercer*. It would be reasonable for a jury to infer that defendant committed the assault based on defendant's statement that the charge represented his first violent act; the consistency of the characteristics of the bullet that injured the victim and a test round fired from defendant's gun; the tire prints found at the storage yard placing defendant's truck at the scene of the larceny; the testimony of a witness to the assault who observed two men fighting in front of a truck, trailer, and tractor immediately following the time when the larceny occurred, and defendant's possession of the stolen tractor found with his truck and trailer hours after the assault.

## III

[2] We find no error in the trial court's determination that the assault was especially heinous, atrocious or cruel. The standard for determining if this aggravating factor is present is "whether the facts of the case disclose excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense*." *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E. 2d 783, 786 (1983). In *Blackwelder*, 309 N.C. at 413, n. 1,

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South Carolina Ins. Co. v. White

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the Supreme Court held, "Where proof of one act constituting an offense is sufficient to sustain a defendant's conviction, multiple acts of the same offense are relevant to the question of sentencing, including whether the offense charged was especially heinous, atrocious or cruel." In the case at bar the victim was beaten, shot in the back of the head, driven over by a car, and left on the highway with his leg caught up underneath the car. We hold that this evidence of multiple acts of assault with a deadly weapon with intent to kill inflicting serious injury justifies a sentence in excess of the presumptive term.

IV

For the reasons set forth above, we find no error at trial or at the sentencing hearing.

No error.

Judges ARNOLD and WELLS concur.

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SOUTH CAROLINA INSURANCE COMPANY v. DONALD EUGENE WHITE,  
JANE WHITE AND ETHELENE HIKES

No. 858SC1368

(Filed 15 July 1986)

**Insurance § 110— automobile liability insurance—payment of policy limit for bodily injury—inclusion of claim for loss of consortium**

Where an automobile liability policy limited coverage to \$25,000 for "all damages" for bodily injury sustained by any one person in one accident, and the policy limit of \$25,000 was paid to the husband for his bodily injuries, the wife's derivative claim for loss of consortium was encompassed within the \$25,000 limit, and the insurer was not obligated to pay the wife for loss of consortium.

APPEAL by defendant Ethelene Hikes from *Llewellyn, Judge*. Order entered 18 October 1985 in Superior Court, WAYNE County. Heard in the Court of Appeals 8 May 1986.

*Wallace, Barwick, Landis, Rodgman & Bower, P.A., by Paul A. Rodgman, for plaintiff appellee.*

*Duke and Brown, by John E. Duke, for defendant appellant.*

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*South Carolina Ins. Co. v. White*

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BECTON, Judge.

On 21 December 1982, Donald Hikes sustained injuries resulting in, among other things, the loss of a leg when the motorcycle he was riding collided with the insured vehicle of Donald and Jane White. Donald Hikes and his wife Ethelene Hikes sued the Whites, but Donald Hikes' claim was settled when the South Carolina Insurance Company (Insurance Company) paid him \$25,000, the policy limits, in full settlement of his damage claim. Because Ethelene Hikes contended that the Insurance Company is obligated to pay damages to her for loss of consortium caused by the personal injury sustained by her husband, the Insurance Company sought declaratory relief to determine its liability to Ethelene Hikes.

Jury trial was waived, and the case was submitted to the trial judge on stipulated facts and trial briefs. Considering the limits of liability for bodily injury set forth in the policy—\$25,000 per person and \$50,000 per accident—the trial court concluded that the \$25,000 payment to Donald Hikes exhausted the policy limits. Ethelene Hikes appeals from a judgment declaring that the Insurance Company had no obligation toward her.

Ethelene Hikes styles her two questions for review as follows:

I. Did the trial court err in ruling that the plaintiff, South Carolina Insurance Company, was not required to answer defendant's interrogatories number 4, 5, 6a, 6b, 6c, 7, 8a, 8b, and 8c?

II. Did the trial court err in ruling that the plaintiff insurance company was not obligated to pay Ethelene Hikes her damages for loss of consortium resulting from damages sustained by the husband of Ethelene Hikes?

Because of our resolution of the second issue, we need not address the first.

The trial court correctly ruled that the Insurance Company was not obligated to pay Ethelene Hikes damages for loss of consortium. First, the policy provides that the maximum award one person may receive for bodily injury sustained in any one accident is \$25,000. Second, claims for loss of consortium are derivative in nature; they are not "bodily injuries."

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South Carolina Ins. Co. v. White

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The policy issued to Donald White contained a "Declaration Page and Endorsement" setting forth bodily injury liability coverage of "\$25,000 Ea. Person, \$50,000 Ea. Acc." The "Limits of Liability" provision states, in relevant part, that:

The limit of liability shown in the Declarations for "each person" for Bodily Injury Liability is our maximum limit of liability for all damages for bodily injury sustained by any one person in any one accident. Subject to this limit for "each person," the limit of liability shown in the Declarations for "each accident" for Bodily Injury Liability is our maximum limit of liability for all damages for bodily injury resulting from any one auto accident. . . . This is the most we will pay as a result of any one accident regardless of the number of . . . [c]laims made. . . .

Notwithstanding the policy's clear language, Ethelene Hikes points out that the policy does not state that the Insurance Company will limit its payment of damages to the insured party. She asserts that the "Insuring Agreement" provision "merely state[s] that [the Insurance Company] would pay damages 'for which the insured becomes legally responsible because of an auto accident.'"

Ethelene Hikes has cited no North Carolina case authority in support of her argument, and we are not persuaded. The term "all damages" used in the policy is all-inclusive. It includes not only direct damages for bodily injury sustained by Donald Hikes, but also any indirect or consequential damages for loss of consortium. Perhaps when the award to the person who sustained the direct bodily injury does not exhaust the maximum policy limits, a consequential or derivative damage claim for the difference may be maintained. But when, as in this case, the policy limit has been exhausted by the settlement of \$25,000 paid to the person who sustained the direct bodily injury, all consequential or derivative damage claims for personal injuries are subsumed within the settlement award.

An analysis of the terms "bodily injury" and "personal injury" helps to clarify the point. Bodily injury refers to "[p]hysical pain, illness or any impairment of physical condition." Black's Law Dictionary 707 (5th ed. 1979). "Personal injury," however, is "used . . . in a much wider sense, and . . . includ[es] any injury which is

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**South Carolina Ins. Co. v. White**

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an invasion of personal rights . . . ." *Id.* at 707. In *Sheffield v. American Indemnity Company*, 245 S.C. 389, 394, 140 S.E. 2d 787, 790 (1965), the South Carolina Supreme Court relied on this distinction in considering whether the husband of a woman who had suffered physical injury could recover under a "bodily injury" insurance policy for loss of consortium, when the wife had already received the policy limit for bodily injury for one person:

The consequential damages sustained by the appellant because of the injuries to his wife are "personal injuries" and not "bodily injuries." The contract of insurance, with which we are here concerned, agrees to indemnify for "bodily injuries" and the sum of \$10,000.00 is the total limit of liability of the respondent for bodily injuries to one person as the result of any one accident.

The Court then held:

We conclude, as did the lower court, that since the wife of the appellant . . . sustained injury by reason of the negligent operation of an uninsured automobile and has been paid the full amount limited by the uninsured motorist endorsement in case of "bodily injury" to one person, her husband, who has sustained no physical injury, cannot recover from the insurer for consequential damages on account of loss of consortium and reimbursement for medical expenses arising out of the injury to his wife, since he has sustained no "bodily injury" within the meaning of the uninsured endorsement.

*Id.* at 397, 140 S.E. 2d at 791.

Similarly, the United States District Court for the Southern District of Indiana held in *Montgomery v. Farmers Insurance Group*, 585 F. Supp. 618, 619 (1984):

While two persons assert claims for damages, the claim of the second is for loss of consortium arising from the bodily injury of the first. [Plaintiff's] claim is part of the "damage arising out of bodily injury sustained by one person in any one occurrence" and, therefore, is encompassed within the \$25,000 limit. The \$50,000 limit could apply only if [plaintiff] had sustained bodily injuries.

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**Kinney v. Baker**

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*See also Biondino v. Southern Farm Bureau*, 319 So. 2d 152 (Fla. App. 1975) (The Court acknowledged that the wife had sustained damages for loss of consortium, but concluded that the maximum amount of recovery was the limit as to one bodily injury and that the insurer had discharged its responsibility to the wife under the policy.), *cert. denied*, 330 So. 2d 14 (Fla. 1976). *See generally* Annot., 13 A.L.R. 3d 1228 (1967).

Had Donald Hikes suffered no bodily injury, Ethelene Hikes would have suffered no injuries and would have had no claim. Her claim, in our view, is derivative. This position is supported by *Nicholson v. Hugh Chatham Memorial Hospital*, 300 N.C. 295, 304, 266 S.E. 2d 818, 823 (1980), in which our Supreme Court held:

[A] spouse may maintain a cause of action for loss of consortium due to the negligent actions of third parties so long as that action for loss of consortium is joined with any suit the other spouse may have instituted to recover for his or her personal injuries.

In sum, because the Insurance Company paid its limit of liability to Donald Hikes for his bodily injury, that damage award necessarily included Ethelene Hikes' claim for loss of consortium under the terms of the policy. We need not address the trial court's alleged error in quashing the interrogatories.

For the foregoing reasons, the judgment rendered is

Affirmed.

Judges ARNOLD and WELLS concur.

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INGRID KINNEY, ADMINISTRATRIX OF THE ESTATE OF MARTIN KINNEY v.  
RICKY J. BAKER

No. 8615SC140

(Filed 15 July 1986)

**Automobiles and Other Vehicles § 94.7— contributory negligence—intoxicated driver—passenger's knowledge of intoxication—directed verdict erroneous**

The trial court erred in an action arising from an automobile accident by directing a verdict for defendant based on deceased's failure to notice defend-

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**Kinney v. Baker**

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ant's intoxication where all of the people who had observed defendant before or after the accident testified that defendant did not appear intoxicated and that they were not able to detect an odor of alcohol about his person, but an assistant medical examiner testified that a person with defendant's blood alcohol level would be noticeably impaired. An allegation that defendant operated the vehicle while his blood alcohol level exceeded .10 percent did not establish that the deceased knew when he rode with defendant that defendant was intoxicated.

APPEAL by plaintiff from *Preston, Judge*. Judgment entered 29 August 1985 in Superior Court, ORANGE County. Heard in the Court of Appeals 11 June 1986.

On 6 February 1983, Martin Kinney was a passenger in a vehicle driven by the defendant. Kinney was killed when the vehicle left the road, struck a creek bank and overturned.

On 27 October 1983, plaintiff filed this wrongful death action against defendant. In her complaint the plaintiff made the following allegations regarding the defendant's negligence:

6. That the crash described above was caused by the negligence of the Defendant, Ricky J. Baker, in operating the 1977 Jeep, in that:

- a) the Defendant operated the vehicle while under the influence of intoxicating liquors in a willful and wanton disregard of the rights and safety of the occupants of the vehicle being driven by the Defendant, and in violation of North Carolina Statute 20-138;
- b) that the Defendant operated this vehicle in a careless manner in a willful and wanton disregard of the rights and safety of the occupants of the vehicle and was traveling at an excessive speed under the circumstances in violation of North Carolina General Statute 20-140;
- c) that the Defendant drove this vehicle on a highway at a speed greater than was reasonable and prudent under the conditions then existing in violation of North Carolina General Statute 20-141;
- d) that the Defendant drove this vehicle on a public highway and failed to decrease speed in order to

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**Kinney v. Baker**

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avoid an accident in violation of North Carolina General Statute 20-141;

- e) that the Defendant failed to maintain a proper lookout and failed to keep the vehicle under proper control.

The complaint was later amended to add the following additional allegation designated as paragraph 6(f):

That defendant operated the vehicle while his blood alcohol level exceeded .10% in a willful and wanton disregard of the rights and safety of the occupants of the vehicle then being driven by the defendant in violation of N.C.G.S. 20-138.

On 26 September 1984, the plaintiff sought leave to amend her complaint by deleting paragraph 6(a) above and inserting a new paragraph 6(a) which read:

The defendant fell asleep while operating the vehicle and drove it outside of the lane provided and off the road in violation of North Carolina General Statute 20-146(d).

Defendant also sought leave to amend to allege that Kinney was contributorily negligent by failing to wear his seat belt. On 24 October 1984, the plaintiff was allowed to amend her complaint consistent with her motion. On 7 December 1984, the defendant's motion to amend was denied.

During the 26 August 1985 session of court the matter came on for trial. At the close of all the evidence the court entered a directed verdict against the plaintiff. From the judgment dismissing the claim, plaintiff appealed.

*Michael E. Mauney for plaintiff appellant.*

*Haywood, Denny, Miller, Johnson, Sessoms & Haywood, by George W. Miller, Jr. and Sherry R. Dawson, for defendant appellee.*

ARNOLD, Judge.

The issue dispositive of this appeal is whether the trial court erred in allowing defendant's motion for a directed verdict. Believing that it was error to direct a verdict, we reverse.

The question presented by the defendant's motion for a directed verdict is whether the evidence, when considered in the



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**Kinney v. Baker**

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light most favorable to the plaintiff, is sufficient to submit the case to the jury. A directed verdict is appropriate only if the evidence reveals, as a matter of law, that plaintiff is not entitled to a verdict. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971).

At trial the plaintiff offered evidence which tended to show that on 5 February 1983 it had begun to snow and sleet. In the early morning hours of 6 February 1983, while it was still snowing, Martin Kinney was riding in a jeep driven by Ricky J. Baker. The jeep slid off the road, down an embankment and landed on its top. At the time the jeep left the road it was traveling approximately 40 miles per hour. The trooper who investigated the accident testified that in his opinion the speed of 40 miles per hour was too fast for conditions at that time. The plaintiff also presented evidence that a blood sample taken four hours after the accident showed the defendant had a blood alcohol level of .117. Based upon this test Dr. Butts, an assistant medical examiner with the State of North Carolina, testified that in his opinion defendant would have had a blood alcohol level of .157 at the time the accident occurred.

The defendant offered evidence which tended to show that earlier in the morning another wreck had occurred near Charles Snipes' home. While Snipes was at that wreck he saw the defendant and he did not observe anything wrong with the way defendant acted, talked or handled himself. Mark Elliott, the defendant's and Kinney's roommate, testified that he saw the defendant and the deceased prior to going to bed about 12:00 and that he didn't observe anything unusual about the way they acted. The defendant testified that he had consumed 4 beers between 6:00 p.m. and 10:00 p.m. and that he and Kinney had each consumed two beers after Baker returned home.

On recross examination, Dr. Butts testified that in his opinion someone with the blood alcohol level of the defendant would weave, be disoriented and could possibly have been stumbling when he walked. The doctor further testified that this would have been obvious to someone who saw defendant on a regular basis.

At the close of all the evidence defendant made a motion for a directed verdict. The court granted the motion because it found that the deceased was contributorily negligent as a matter of law.

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Kinney v. Baker

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The court stated that the deceased should have noticed that defendant was under the influence and should not have ridden with defendant. The court found that this failure to notice the defendant's intoxication made the deceased contributorily negligent as a matter of law.

"If one enters an automobile with knowledge that the driver is under the influence of an intoxicant and voluntarily rides with him, he is guilty of contributory negligence *per se*." *Davis v. Rigsby*, 261 N.C. 684, 686-87, 136 S.E. 2d 33, 35 (1964). This knowledge may be proven either by testimony or by the pleadings. See *id.*

In the case *sub judice* neither the pleadings nor the evidence establish as a matter of law that the deceased knew or should have known that defendant was intoxicated. The evidence offered at trial is in conflict regarding whether the defendant's intoxication was noticeable. All the people who testified at trial that they had observed the defendant either before or after the accident testified defendant did not appear to be intoxicated, nor were they able to detect an odor of alcohol about his person. Dr. Butts testified, however, that in his professional opinion a person who had a blood alcohol level of the defendant would be noticeably impaired. Because there was a conflict in the evidence, it was clearly a question of fact for the jury regarding whether the deceased was contributorily negligent because he knew or should have known of defendant's intoxication and still rode with him.

Since defendant was not entitled to a directed verdict based upon the evidence we must look to the pleadings to determine whether plaintiff's claim was barred by an admission. Defendant argues that paragraph 6(f) of the complaint alleges a bar to recovery. Paragraph 6(f) states:

That defendant operated the vehicle while his blood alcohol level exceeded .10% in a willful and wanton disregard of the rights and safety of the occupants of the vehicle then being driven by the defendant in violation of N.C.G.S. 20-138.

This allegation does not establish that the deceased knew when he rode with the defendant that the defendant was intoxicated. It merely alleges that at the time of the accident the defendant's blood alcohol level was higher than that allowed by law. We hold

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**Griggs v. Morehead Memorial Hospital**

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that it was improper to direct a verdict based upon this allegation.

The plaintiff was entitled to have a jury determine the issues in this cause. Thus, the judgment is reversed and the case is remanded for a

New trial.

Judges EAGLES and PARKER concur.

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LELIA A. GRIGGS v. MOREHEAD MEMORIAL HOSPITAL

No. 8517SC1074

(Filed 15 July 1986)

**Hospitals § 3.2— negligence by hospital—failure to make direct nurse-patient assignments**

In an action to recover for injuries received by the eighty-nine-year-old plaintiff when she fell and fractured her hip while a patient in the intensive-coronary care unit of defendant hospital, plaintiff's forecast of evidence was sufficient to permit a jury to infer that defendant hospital negligently deviated from the standard of care and that such negligence was a proximate cause of plaintiff's fall where defendant admitted that direct nurse-patient assignments had not been made on the night of plaintiff's injury in violation of the hospital's own policy and State regulations, and where other issues of fact were presented as to whether plaintiff's bedrails were up or down, whether plaintiff crawled to the foot of the bed or climbed over the rail, and whether plaintiff's heart monitor was off or on.

APPEAL by plaintiff from *Wood, Judge*. Order entered 30 July 1985 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 5 March 1986.

*Graham, Miles & Bogan, by Donald T. Bogan, for plaintiff appellant.*

*Tuggle, Duggins, Meschan & Elrod, P.A., by Joseph E. Elrod, III, Sally A. Lawing, and J. Reed Johnston, Jr., for defendant appellee.*

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**Griggs v. Morehead Memorial Hospital**

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BECTON, Judge.

Plaintiff, Lelia A. Griggs, brought suit against defendant Morehead Memorial Hospital to recover damages for injuries suffered during her hospital stay in April, 1983. The superior court entered summary judgment for the hospital, and Lelia Griggs appeals. We reverse and remand to the superior court for trial.

I

Lelia Griggs was admitted to the Intensive-Coronary Care Unit (ICCU) of Morehead Memorial Hospital on 3 April 1983, suffering respiratory and cardiac arrest. Mrs. Griggs was eighty-nine years of age, somewhat overweight, and had a history of diabetes, ischemic heart disease and chronic decreased vision and hearing. Although her condition had improved within forty-eight hours of her admission to the ICCU, on 6 April 1983 Mrs. Griggs was receiving narcotic pain medication as well as intravenous fluids, and she was still connected to a heart monitor.

At approximately 9:35 p.m. on 6 April 1983, Mrs. Griggs was discovered on the floor of her room in the ICCU with a fractured hip. There were six patients, including Mrs. Griggs, in the ICCU at the time of the fall. There were also four hospital employees on the unit—R.N.'s Mac Hodges, Robin Land and Ken Thompson, and L.P.N. Dottie Dyer. The lead wires to Mrs. Griggs' heart monitor had been disconnected, and the I.V. had been removed and tied to the side rail of her bed. Mrs. Griggs does not remember how she fell, and no one saw her fall or heard the alarm on the heart monitor sound.

As a result of the fall, Mrs. Griggs required surgery to implant an artificial hip, developed a staph infection in the hip and had to have the prosthesis removed. She incurred medical expenses in excess of \$60,000.00.

II

Mrs. Griggs asserts that the trial court erred in entering summary judgment against her because her forecast of evidence tended to establish a *prima facie* case of negligence. We agree and reverse the entry of summary judgment.

Summary judgment is a drastic remedy and is rarely appropriate in a negligence action because, ordinarily, it is the jury's duty to apply the standard of care and to pass upon issues

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**Griggs v. Morehead Memorial Hospital**

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of breach, causation and contributory negligence. See *Abner Corp. v. City Roofing & Sheetmetal Co.*, 73 N.C. App. 470, 326 S.E. 2d 632 (1985).

The party moving for summary judgment, in this case the hospital, has the initial burden of showing that an essential element of the plaintiff's case does not exist as a matter of law or of showing through discovery that plaintiff has not produced evidence to support an essential element of her claim. See, *Rorrer v. Cooke*, 313 N.C. 338, 329 S.E. 2d 355 (1985).

The hospital contends that Mrs. Griggs has failed to demonstrate that any of the alleged breaches of duty was the proximate cause of her fall and injury.

Causation is an inference of fact to be drawn from other facts and circumstances. *Hairston v. Alexander Tank and Equipment Co.*, 310 N.C. 227, 234, 311 S.E. 2d 559, 566 (1984). However, it is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury. *Conley v. Pearce-Young-Angel Co.*, 224 N.C. 211, 214, 29 S.E. 2d 740, 742 (1944). But, that is rarely the case. *Id.* Therefore, proximate cause of an injury is ordinarily a jury question. *Id.* (Citations omitted.)

There is sufficient evidence from which a jury could determine that the hospital had negligently deviated from the standard of care. The hospital admits that on the night of Mrs. Griggs' fall and injury, direct nurse-patient assignments had not been made in violation of the hospital's own policy, promulgated pursuant to state regulations. See 10 N.C.A.C. 3c, .0501(a) (1986). Although we find no merit in Mrs. Griggs' contention that the hospital's violation of the regulation constitutes negligence *per se*, violation of a statute may be proof of a duty owed and breached. That is, although N.C. Gen. Stat. Sec. 90-21.12 (1985) (enacted 1975) codifies the common law obligation of the health care provider to the patient and establishes the standard of care, a violation of a health care regulation may be proof of a negligent deviation from that standard of care. See, *Makas v. Hillhaven, Inc.*, 589 F. Supp. 736 (M.D.N.C. 1984); *Tice v. Hall*, 310 N.C. 589, 313 S.E. 2d 565 (1984).

The hospital then argues, in essence, that even if it were legally negligent because it violated hospital policy and state regu-

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**Griggs v. Morehead Memorial Hospital**

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lations and thus deviated from the standard of care, it cannot be liable because there is no evidence that the nurses on duty would have acted any differently had one of them been directly assigned to Mrs. Griggs. There is no proof, they argue, that the violation was a proximate cause of the fall.

Mrs. Griggs contends that the doctrine of *res ipsa loquitur* applies to establish a presumption of negligence against the hospital in this instance. While we are not persuaded that *res ipsa loquitur* is applicable here, we hold that whether an injury such as the one suffered by Mrs. Griggs was a foreseeable consequence of the hospital's lapse is a question for the jury. We cannot say that it is *not* one as a matter of law.

In addition, there are genuine issues of material fact with respect to other aspects of the case. The nurses on duty testified that the bedrails were up when they found Mrs. Griggs on the floor, and opined that she must have crawled to the foot of the bed to exit. However, Dr. Parsons' report, which was written on the day after the fall, stated that the bedrails were down. Dr. Parsons wrote his report after talking to some of the employees who had been present the night before, and he apparently concluded that Mrs. Griggs had lowered the rails herself.

Whether the bedrails were up or down, whether Mrs. Griggs crawled to the foot of the bed or climbed over the rail, whether the heart monitor was off or on, are genuine issues of fact. The relationship that any or all of these facts have to the hospital's failure to make direct nurse-patient assignments on the night of Mrs. Griggs' fall and injury go to the proof of causation. Plaintiff should have an opportunity to present these facts to a jury. The trial court's entry of summary judgment in favor of the hospital is, therefore,

Reversed.

Judges JOHNSON and MARTIN concur.

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**State v. Oliver**

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**STATE OF NORTH CAROLINA v. LANGSTON OLIVER**

No. 8617SC88

(Filed 15 July 1986)

**1. Burglary § 7— breaking and entering with intent to commit rape and larceny—failure to submit misdemeanor breaking or entering—no prejudice**

In a prosecution for first degree burglary in which defendant was alleged to have broken and entered with the intent to commit rape and larceny, there was no prejudice from the trial court's failure to submit misdemeanor breaking and entering on the theory that defendant intended to have consensual sexual intercourse because defendant's conviction was based on intent to commit larceny.

**2. Criminal Law § 66.20— impermissible pretrial identification procedure—admissibility of in-court identification—findings sufficient**

The trial court's findings of fact were sufficient in a prosecution for first degree burglary in which defendant's motion to suppress the victim's in-court identification testimony as tainted by an impermissible pre-arrest photographic identification was denied without a recitation that the findings were based on clear, strong and convincing evidence; the trial judge is required to apply the clear and convincing evidentiary standard but is not required to declare in writing that the standard was applied.

APPEAL by defendant from *Wood, Judge*. Judgment entered 8 August 1985 in Superior Court, CASWELL County. Heard in the Court of Appeals 14 May 1986.

Defendant was indicted for first degree burglary, the allegation being that he broke and entered the occupied home of Betty Blalock (now Rashed) in the early morning hours of 31 December 1984 with the intent to commit rape and larceny therein. In his first trial the jury could not agree on a verdict and a mistrial was ordered. Upon being retried the jury found him guilty and that his breaking and entering was done with the intent to commit larceny therein.

In gist the State's evidence tends to show that: On the night in question Ms. Rashed was in her home asleep on a sofa. The room was illuminated by a lamp at the end of the sofa close to her feet and by an overhead lamp which shined from an adjoining room through an open doorway at the other end of the sofa. As Ms. Rashed slept she felt something on her thigh and brushed it away without fully waking. When she felt it again she realized it was someone's hand and she threw the blanket back and saw the

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State v. Oliver

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defendant on the sofa with her; his face was but two or three feet away. She screamed and he ran out of the house. A neighbor, awakened by the scream, telephoned the county Sheriff and deputies took her to the department office. After accurately describing defendant to the deputies she picked him out of a photographic line-up; this line-up was held to be impermissibly suggestive at the first trial and evidence concerning it was not offered in this trial. But, afraid to go home, she was still in the Sheriff's Department several hours later when defendant was brought in by deputies and she immediately identified him as the intruder. After returning home a search revealed that a pistol had been taken from a dresser in the room that defendant entered.

Defendant's evidence tended to establish an alibi. He testified that he was at home that night sleeping off a day of drinking and smoking marijuana, and had never been in Ms. Rashed's home. His testimony as to his whereabouts when the crime was committed was corroborated by that of other witnesses.

*Attorney General Thornburg, by Assistant Attorney General Barbara Peters Riley, for the State.*

*W. Osmond Smith, III and Mark Galloway for defendant appellant.*

PHILLIPS, Judge.

[1] The first of two questions raised by defendant's appeal is whether the trial court erred in refusing to submit the lesser included offense of misdemeanor breaking and entering to the jury. Defendant argues that since the State's evidence shows that he fled without further ado when she resisted his advances the jury could have found that he entered the apartment with the non-felonious intent to have sex with Ms. Rashed but only if she was agreeable. Assuming *arguendo* that the jury could have found from the State's evidence (the defendant's evidence being that he was not even there) that *so far as sex* was concerned his entry was without a felonious intent, the failure to submit such an issue to the jury did not prejudice the defendant in our opinion. For the defendant's felony conviction is not based upon his intentions concerning sex, it is based upon his intent to commit larceny and it is most unlikely, we think, that he would not have been convicted of



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State v. Oliver

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that offense if the issue requested had been submitted. *State v. Ray*, 299 N.C. 151, 261 S.E. 2d 789 (1980).

[2] The other question presented is whether defendant's motion to suppress Ms. Rashed's in-court testimony identifying him as the burglarious intruder should have been granted. In his assignment of error defendant contended that the testimony should have been suppressed because it was irretrievably tainted by the impermissible suggestiveness of the pre-arrest photographic identification procedure. In his brief, however, this contention is neither argued nor supported and we deem it to have been abandoned. Rule 28(a), N.C. Rules of Appellate Procedure. The contention that is made, for the first time, and argued is that the findings of fact made by the court on the suppression-admissibility issue were inadequate. Though the contention is not properly before us we nevertheless have considered it and determined that it is also without merit. When the in-court identification of defendant by Ms. Rashed was challenged, a *voir dire* was conducted in the absence of the jury, as the law requires. Based on the evidence presented the trial judge determined that the proffered in-court identification testimony was of independent origin and was not tainted by the impermissible photographic line-up. That determination is supported by detailed findings of fact, all of which are supported by competent evidence. These findings are therefore binding upon us. *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974). The inadequacy in the court's findings that defendant now points to is that they do not *recite* that they are based on "clear, strong and convincing evidence," as he apparently understands *State v. Yancey*, 291 N.C. 656, 231 S.E. 2d 637 (1977), *State v. Jacobs*, 277 N.C. 151, 176 S.E. 2d 744 (1970), and *State v. Accor*, 277 N.C. 65, 175 S.E. 2d 583 (1970) to require. While those decisions do require the trial judge to *apply* the clear and convincing evidentiary standard in determining that identification testimony was of independent origin, they do not require the judge to declare in writing that the standard was applied. Our review of the record indicates that the judge followed the law in ruling on the challenged testimony and the assignment of error is overruled.

No error.

Judges MARTIN and PARKER concur.

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**In re Poteat v. Employment Security Comm.**

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IN THE MATTER OF: JOHN H. POTEAT v. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA AND LEON GILLIAM & SONS, INC.

No. 8615SC184

(Filed 15 July 1986)

**1. Master and Servant § 108—unemployment compensation—leaving work voluntarily and without good cause**

N.C.G.S. § 96-14(1) disqualifies a claimant from receiving unemployment benefits only if the claimant left work (1) voluntarily *and* (2) without good cause attributable to the employer. The statute does not disqualify a claimant from receiving benefits if he leaves work involuntarily *or* leaves for good cause attributable to the employer.

**2. Master and Servant § 108—unemployment compensation—leaving work before termination date—no voluntary quit**

A finding by the Employment Security Commission that claimant left work after being told that he would be terminated four days later does not support its conclusion that claimant left work voluntarily, and claimant was thus not disqualified by N.C.G.S. § 96-14(1) from receiving unemployment benefits. The 1985 amendment to N.C.G.S. § 96-14(1) did not apply to this case.

APPEAL by claimant from *Walker, Hal H., Judge*. Judgment entered 12 November 1985 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 6 June 1986.

Claimant, John H. Poteat, was employed by Leon Gilliam & Sons, Inc. as a truck driver for approximately fourteen months. On Monday, 13 May 1985, claimant was told by his employer that he would be terminated on Friday, 17 May 1985, but that he could work until that date. Claimant left work at noon on 13 May and filed a claim for unemployment benefits. The claim was initially denied by an adjudicator for the Employment Security Commission. Claimant appealed and an evidentiary hearing was held before an Appeals Referee, who ruled that claimant was disqualified for unemployment benefits. Claimant then appealed to the Employment Security Commission. The Commission found the following facts:

2. The claimant left this job under the following circumstances: About three (3) weeks before his last day of work, the employer had walked through the plant and said "he might let somebody go, he'd let somebody know to start with." Due to personal illness and court activities due to child

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**In re Poteat v. Employment Security Comm.**

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support responsibilities of his, the claimant had missed some work. Because of his missing work and not being dependable for regular work, on his last day of work the employer told him that he could be looking for another job, but he could work until Friday, May 17, 1985. When his request for a lay-off slip was denied, he worked until noon and left to look for another job, and also filed a claim for unemployment insurance benefits.

3. When the claimant left the job on Monday, May 13, 1985, continuing work was available for the claimant there until Friday, May 17, 1985.

Based on those findings, the Commission determined that claimant had left work voluntarily without good cause attributable to his employer and was, therefore, disqualified for unemployment benefits.

Claimant petitioned the Superior Court of Alamance County for judicial review. From a judgment affirming the Commission's decision, claimant appeals.

*North State Legal Services, Inc., by Carlene M. McNulty, for claimant appellant.*

*T. S. Whitaker, Chief Counsel, and Thelma M. Hill, Staff Attorney, for appellee Employment Security Commission of North Carolina.*

MARTIN, Judge.

Claimant assigns error to the entry of judgment, contending that "the evidence was insufficient to support the conclusion that [claimant] voluntarily left his job without good cause attributable to the employer." Claimant has taken no exception to the Commission's findings of fact; they are therefore presumed to be supported by the evidence and are conclusive on appeal. *In re Hagan v. Peden Steel Co.*, 57 N.C. App. 363, 291 S.E. 2d 308 (1982). The scope of our review is limited to a determination of whether the Commission's findings of fact support its conclusion that claimant was disqualified for unemployment compensation pursuant to G.S. 96-14(1). We hold that they do not.

[1] The applicable provisions of G.S. 96-14(1) provide that a person who is "unemployed because he left work voluntarily without

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**In re Poteat v. Employment Security Comm.**

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good cause attributable to the employer" is disqualified from receiving benefits under the Employment Security Act. Provisions of the Act which impose disqualifications for its benefits must be strictly construed in favor of the claimant. *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968). Accordingly, we construe the above quoted provisions of G.S. 96-14(1) to disqualify an employee from benefits only if both prongs, i.e., (1) a "voluntary quit" and (2) without good cause attributable to the employer, are met. If a person leaves work involuntarily, or leaves for good cause attributable to the employer, he is not disqualified from benefits provided he meets the other requirements of the Act. *Ray v. Broyhill Furniture Industries*, 81 N.C. App. 586, 344 S.E. 2d 798 (1986).

[2] Claimant contends that because he was told of his impending discharge, his leaving work four days earlier than the effective date of his discharge was not voluntary. He cites *Bunn v. N.C. State University*, 70 N.C. App. 699, 321 S.E. 2d 32 (1984), *disc. rev. denied*, 313 N.C. 173, 326 S.E. 2d 31 (1985) in support of his contention. In *Bunn*, claimant was told by her supervisors that she was not qualified for the job, that her work was "pitiful," and that she would be discharged at the end of the month. As a consequence of these statements, claimant decided that she could not return to work. Her claim for unemployment benefits was denied by the Commission, based upon its application of G.S. 96-14(1) to the facts. This Court reversed, holding, in essence, that neither prong of the test of disqualification under G.S. 96-14(1) was met. First of all, the Court said, claimant's leaving was not voluntary, because even though she made the choice not to return to work, her decision was not "entirely free, or spontaneous." *Id.* at 702, 321 S.E. 2d at 34. "[A]n individual's decision to leave work when informed of an imminent discharge . . . is a consequence of the employer's decision to discharge and is not wholly voluntary." *Id.* Second, the Court held that Mrs. Bunn acted reasonably in seeking other work, in view of the humiliation and embarrassment of knowing that her supervisors had characterized her work as "pitiful," so that her leaving was "with good cause attributable to the employer."

G.S. 96-14(1) has since been amended to provide that "[w]here an employer notifies an employee that such employee will be separated on some definite future date for lack of available work, the

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**Laurel Park Villas Homeowners Assoc. v. Hodges**

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impending separation does not constitute good cause for quitting that employment. . . ." (Session Laws 1985, chap. 552, sec. 12, eff. 1 July 1985.) Neither the effective date of the amendment nor its substantive provisions render it applicable to this case.

No question of "good cause attributable to the employer" arises upon the evidence or the facts found by the Commission in this case. The sole question is whether the Commission's finding that claimant left work after being told that he would be terminated four days in the future supports its conclusion that he "left work voluntarily." Following *Bunn, supra*, as we are bound to do, we hold that G.S. 96-14(1) does not bar claimant from receiving benefits. The judgment of the Superior Court affirming claimant's disqualification must be vacated.

For the foregoing reasons, the judgment of the Superior Court of Alamance County is vacated and this cause is remanded to that court for entry of an order remanding the cause to the Employment Security Commission for an award of benefits.

Vacated and remanded.

Judges PHILLIPS and PARKER concur.

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LAUREL PARK VILLAS HOMEOWNERS ASSOCIATION, INC. v. MICHAEL  
HODGES

No. 8629DC112

(Filed 15 July 1986)

**Deeds § 20.6— restrictive covenants—standing to enforce**

Plaintiff homeowners' association lacked standing under N.C.G.S. § 47A-10 to bring an action in its own name to enforce unrecorded restrictions against a unit owner where plaintiff did not allege that it owned any land; did not argue that the rule of strict construction in *Beech Mountain Property Owners' Assoc. v. Current*, 35 N.C. App. 135, did not apply; never alleged that the action was maintained by its board of directors or manager; and no aggrieved unit owners were involved. Although there was a provision in the Articles of Incorporation that purported to give the corporation the power to bring such an action, there was nothing in the articles or the bylaws authorizing persons other than the board, its officers, or the membership to act on behalf of the corporation, there was nothing in the record suggesting that any

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**Laurel Park Villas Homeowners Assoc. v. Hodges**

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of those groups authorized this action, and the bylaws provided that they were established in accordance with N.C.G.S. Chapt. 47A and that in case of conflict the statute should control.

APPEAL by plaintiff from *Gash, Judge*. Order entered 25 June 1985 in District Court, HENDERSON County. Heard in the Court of Appeals 11 June 1986.

Plaintiff is an incorporated condominium homeowners association. As authorized by its recorded bylaws, plaintiff established various restrictions on activity at the condominiums, although it is not apparent that these restrictions were recorded. Defendant purchased a condominium. Complaint was made against him for violating the restrictions by having his minor child living with him on the premises, by parking his pickup in the common parking lot and by playing his stereo too loud. Plaintiff corporation then brought this suit, seeking to enjoin further violations or to force defendant to vacate. Several unit owners intervened in support of plaintiff, but later took a voluntary dismissal with prejudice. The court dismissed the action for lack of standing, and plaintiff appeals.

*Ramsey, Hill, Smart, Ramsey & Pratt, by Michael K. Pratt, for plaintiff-appellant.*

*No brief for defendant-appellee.*

EAGLES, Judge.

The trial court dismissed the action for lack of standing under G.S. 47A-10:

Each unit owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in the declaration or in the deed to his unit. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both, *maintainable by the manager or board of directors on behalf of the association of unit owners or, in a proper case, by an aggrieved unit owner.* (Emphasis added.)

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**Laurel Park Villas Homeowners Assoc. v. Hodges**

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Plaintiff argues that the emphasized language broadens, rather than restricts, the parties who may sue to enforce the restrictions.

In *Beech Mountain Property Owners' Assoc. v. Current*, 35 N.C. App. 135, 240 S.E. 2d 503 (1978), we considered a similar situation. There an incorporated property owners' association sought to enforce certain provisions which the common Declaration of Restrictions gave owners the right to enforce. We held that the provisions did not expressly give the corporate plaintiff the right to sue as an agent of the owners, from whom it must be regarded as separate. The corporate plaintiff owned no land in its own right. We applied a rule of strict construction to the restrictive covenants themselves and to the determination of standing, holding that the corporate entity lacked standing to enforce the provisions.

Plaintiff did not allege that it owned any land. It has not argued that the *Beech Mountain* rule of strict construction does not apply. It has never alleged that the action is maintained by its board of directors or manager; no aggrieved unit owners are involved. Applying the terms of the statute strictly, we must conclude that the court did not err in dismissing the action.

We reject plaintiff's contention that G.S. 47A-10 is a broadening statute. A statute will be construed to give effect to all of its parts, and we will avoid constructions which effectively render portions of it meaningless. *State v. Jones*, 67 N.C. App. 377, 313 S.E. 2d 808 (1984). Where the legislature has specifically designated certain statutory procedures, it has by implication excluded other procedures. See *Campbell v. Church*, 298 N.C. 476, 259 S.E. 2d 558 (1979) (applying the doctrine of *expressio unius est exclusio alterius*). To hold, as plaintiff argues, that the statutory designation of parties who may maintain an action is merely illustrative, would make the statutory designation meaningless and contrary to both its implication and the rule of strict construction. This is especially so since the corporation here exists by virtue of statute and operates under the statutory scheme established by G.S. Chapter 47A; no common law rights are at stake.

Plaintiff argues that the corporate bylaws expressly give it the power to bring this action. We agree that there is a provision in plaintiff's Articles of Incorporation that purports to give the

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Laurel Park Villas Homeowners Assoc. v. Hodges

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corporation that power. However, a provision of the bylaws indicates that all powers of the corporation shall be exercised by the board of directors, and allows the board to designate officers. There is nothing in the articles or the bylaws authorizing persons other than the board, its officers, or the membership to act on behalf of the corporation, and nothing in the record suggesting that any of these authorized this action. In any event, the bylaws also provide that they are established in accordance with G.S. Chapter 47A, and that in case of conflict the statute shall control. Since the statute specifically designates who may sue to enforce the restrictions, it controls. We therefore hold that the court correctly determined that plaintiff lacked standing to prosecute this action.

While the parties did not reach this question, we note that unrecorded restrictions enacted by homeowners' associations appear to be unenforceable under G.S. Chapter 47A. Throughout the Chapter, the legislature has insisted on due recordation as the proper means of creating a condominium with enforceable mutual covenants. G.S. 47A-13; G.S. 47A-15; G.S. 47A-16; G.S. 47A-18. G.S. 47A-28 makes unit owners subject to the statutory provisions and to the declaration and bylaws, which must be recorded. In particular, G.S. 47A-18 requires that bylaws must be recorded. The *bylaws* must contain any restrictions, not contained in the declaration, respecting use and maintenance to prevent unreasonable interference with the unit owners' property. G.S. 47A-19(7). Unrecorded regulations of the homeowners' association, especially restrictions as intrusive as those barring minor children and pickup trucks, would appear to lie outside the enforceable scope of the statute.

However, since we have determined that plaintiff corporation lacked standing to sue in its own name to enforce these restrictions, we need not decide this and other questions on the merits. Since the relief sought is injunctive in nature, aggrieved members of plaintiff could undoubtedly have brought an action in their own names in accordance with G.S. 47A-10. As it stands, however, the present appeal is without merit and the dismissal must be

Affirmed.



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**Maddox v. Friday's, Inc.**

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Judge ARNOLD concurs.

Judge PARKER concurs in the result.

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CYNTHIA C. MADDOX v. FRIDAY'S, INC. AND STEPHEN E. HAYNER, D/B/A  
FRIDAY'S, INC., D/B/A FRIDAY'S

No. 8518SC1320

(Filed 15 July 1986)

**Negligence § 57.6— fall caused by beer bottle on dance floor—summary judgment inappropriate**

Summary judgment in favor of defendant was inappropriate in an action to recover for injuries allegedly sustained by plaintiff when she stepped on a beer bottle while dancing in defendant's restaurant and dance hall where the evidence was conflicting on the issue of whether plaintiff was injured in defendant's place of business; plaintiff's testimony that she did not see the bottle before stepping on it did not establish her contributory negligence as a matter of law; and defendant failed to show that plaintiff will be unable to prove that defendant either put the offending bottle on the dance floor or that the bottle was there long enough for defendant to discover and remove it in the exercise of reasonable care.

APPEAL by plaintiff from *Rousseau, Judge*. Judgment entered 9 September 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 7 May 1986.

*Hunter, Hodgman, Greene, Donaldson, Cooke & Elam, by Richard M. Greene, for plaintiff appellant.*

*Frazier, Frazier & Mahler, by Harold C. Mahler, for defendant appellees.*

PHILLIPS, Judge.

This appeal is from an order of summary judgment which dismissed plaintiff's suit to recover damages for injuries allegedly sustained when she stepped on a beer bottle while dancing in defendant's restaurant and dance hall. Defendant denied plaintiff's principal allegations and pleaded plaintiff's contributory negligence. The following principles of law are dispositive of the appeal: The mere filing of a summary judgment motion requires

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**Maddox v. Friday's, Inc.**

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nothing whatever of the opponent; for the movant has the burden of clearly establishing the lack of any triable issue and that it is entitled to judgment as a matter of law. *Yount v. Lowe*, 288 N.C. 90, 215 S.E. 2d 563 (1975). A defendant who contends that the plaintiff is unable to prove an essential element of his case has the burden of establishing that inability; and until he does so the plaintiff is not required to show otherwise. *Hall v. Funderburk*, 23 N.C. App. 214, 208 S.E. 2d 402 (1974). The record plainly shows that the lack of any triable issue has not been established and that defendant is not entitled to judgment as a matter of law.

The evidence on which plaintiff's case was dismissed consists only of the discovery depositions of the plaintiff and defendant Hayner and plaintiff's affidavit. In pertinent part *plaintiff's deposition* and *affidavit* are to the following effect: On the evening involved while dancing in defendant's place of business she stepped upon a beer bottle that broke and cut her foot. The incident occurred after she had been dancing on the same three foot space for about ten or fifteen minutes and when she was in the process of turning around preparatory to leaving the dance floor. She did not see the bottle until the instant that her foot hit it and before then had not seen any other bottle or debris on the dance floor. She does not know how the bottle came to be on the floor or who placed it there. Stepping on the bottle is what attracted her attention to it and though the place was dimly lit she saw the bottle, which was standing on its base, without difficulty when she looked to see what her foot had contacted. A fragment of broken glass penetrated her foot near the strap on her shoe. She had her shoes on then and did not take them off until after she was injured. Some people dancing had beer bottles or glasses in their hands and there were bottles and glasses on a nearby bookcase-like stand or cabinet. In pertinent part *defendant Hayner's deposition* is to the following effect: He knew plaintiff cut her foot that night but it occurred after she left the premises barefooted. Defendant had no rule against patrons dancing with beer bottles or glasses in their hands and many usually did so. It was not unusual for a glass or beer bottle to drop or fall to the dance floor and break and when that happened defendant's employees promptly cleaned the floor.

The case, pleadings, and rudimentary principles of negligence law being as they are plaintiff's action is dismissible only if the

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Maddox v. Friday's, Inc.

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foregoing evidence establishes either that plaintiff was not hurt on defendant's premises, or that defendant was not negligent on the occasion involved, or that plaintiff was contributorily negligent as a matter of law. The evidence establishes none of those things. On the issue of whether plaintiff was injured in defendant's place of business the evidence is conflicting and contradictory. On the contributory negligence issue while plaintiff's testimony that she did not see the bottle before stepping on it is sufficient to support a finding that she was contributorily negligent it certainly does not require such a finding as a matter of law since she had no notice that the place was unsafe and had a right to assume that defendant was not negligent. *Chaffin v. Brame*, 233 N.C. 377, 64 S.E. 2d 276 (1951). And on the negligence issue defendant presented no evidence whatever that it was not negligent and, for all intents and purposes, plaintiff presented none that it was. Apparently, the motion for summary judgment was made and granted because plaintiff failed to present evidence that defendant either put the offending beer bottle on the dance floor or that it was there long enough for defendant to discover and remove it in the exercise of reasonable care. While that is precisely what plaintiff must prove in order to establish defendant's negligence at trial, *Revis v. Orr*, 234 N.C. 158, 66 S.E. 2d 652 (1951), she was not required to present such evidence in the hearing below because she was not confronted with any evidence to the contrary. Nor did plaintiff's testimony exonerate defendant of fault, as it argues. Plaintiff testified only that *she* does not know when or how the bottle got on the dance floor; she did not testify, and was not asked to testify, that no one else knows when or how the bottle got on the floor. Thus, it is entirely possible that one or more of the many persons that were in the dance hall when plaintiff was injured can testify as to defendant's fault and it cannot be surmised that such evidence does not exist. *Burton v. Kenyon*, 46 N.C. App. 309, 264 S.E. 2d 808 (1980). In *Goode v. Tait, Inc.*, 36 N.C. App. 268, 243 S.E. 2d 404, *disc. rev. denied*, 295 N.C. 465, 246 S.E. 2d 215 (1978), where plaintiff was unable to testify as to the defendant's negligence but it was possible that others could, the result was the same.

In reversing the order of dismissal we reiterate, however, that if plaintiff is in fact unable to produce evidence of defendant's negligence in accord with the rule laid down in *Revis*

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**Maddox v. Friday's, Inc.**

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*v. Orr, supra*, that pursuing the matter to trial would be a vain undertaking.

Reversed.

Judges MARTIN and PARKER concur.

## CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 JULY 1986

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| BERTHIEZ v. BERTHIEZ<br>No. 8528DC1201   | Buncombe<br>(84CVD3009)                              | Affirmed |
| BRANNON v. BRANNON<br>No. 8621DC148  | Forsyth<br>(84CVD4649)                               | No Error |
| CAROLINA MEDICAL<br>PRODUCTS COMPANY v.<br>SOUTHEASTERN HOSPITAL<br>SUPPLY CORP.<br>No. 8515SC1211 | Orange<br>(84CVS213)                                 | Affirmed |
| DUNCAN v. DUNCAN<br>No. 8527DC1199   | Cleveland<br>(84CVD246)                              | Affirmed |
| HAMBY v. TRIPLETT<br>No. 8625SC62  | Caldwell<br>(83CVS1208)                              | No Error |
| IN RE FORECLOSURE<br>OF COMBS<br>No. 8517SC1353  | Rockingham<br>(84SP301)                              | No Error |
| SPENCE v. SPAULDING<br>AND PERKINS, LTD.<br>No. 8510SC1241   | Wake<br>(84CVS1442)                                  | No Error |
| STATE v. HARVEY<br>No. 851SC1328   | Gates<br>(85CRS577)<br>(85CRS579)<br>(85CRS1162)     | No Error |
| STATE v. JAVIER<br>No. 856SC1187   | Halifax<br>(85CRS6334)<br>(85CRS6338)<br>(85CRS6522) | No Error |
| STATE v. REED<br>No. 8527SC1258  | Gaston<br>(85CRS3402)                                | No Error |
| STEINBACH v. VENTERS<br>No. 8610DC50   | Wake<br>(84CVD8185)                                  | Affirmed |
| UPDIKE v. DAY<br>No. 8628SC21  | Buncombe<br>(83CVS2104)                              | Affirmed |

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**State v. Teasley**

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STATE OF NORTH CAROLINA v. RUSSELL WILLIAM TEASLEY

No. 8629SC154

(Filed 5 August 1986)

**1. Searches and Seizures § 20— application for warrant—oral statements to magistrate not recorded—affidavit only as basis for issuance of warrant**

Where an officer testified that, at the time he submitted his sworn statement with a search warrant application to the magistrate, he also made oral statements under oath that he had seen some white powder which he believed to be cocaine, but the evidence did not show that the magistrate recorded or contemporaneously summarized in the record the officer's statement to her, the magistrate's additional information thus was not recorded as required by N.C.G.S. § 15A-245(a), and the issuance of the warrant therefore must rest solely on the officer's affidavit.

**2. Searches and Seizures § 23— issuance of warrant—sufficiency of affidavit to show probable cause**

An affidavit alleging that defendant assaulted members of a volunteer fire department by pointing a long shoulder type weapon at them and thereby preventing them from approaching his barn to extinguish a fire, that arresting officers who entered his residence to arrest defendant observed various types of drug paraphernalia, and that defendant was a known drug courier for someone in the area of Chapel Hill provided the magistrate with a substantial basis for concluding that there was probable cause to believe that evidence of a crime would be discovered in defendant's house, and the trial court therefore did not err in denying defendant's motion to suppress evidence seized during a search of his house.

**3. Constitutional Law § 30— prior criminal record—discovery—defendant not prejudiced**

Defendant was not prejudiced by the trial court's alleged failure to grant his motion to discover his prior criminal record, since the court apparently granted defendant's motion; the record did not indicate any renewed requests by defense counsel for a criminal record or further orders; the State made no use of any criminal record at trial or sentencing; and defendant thus failed to show any prejudice.

**4. Constitutional Law § 44— time to prepare defense—no denial of effective assistance of counsel**

There was no merit to defendant's contention that he was denied effective assistance of counsel because the court denied his motion for a continuance where defense counsel moved on 18 September for a continuance alleging that defendant had retained him on 17 September and he had not had an opportunity to prepare a defense, but the record showed that defense counsel had been involved in defendant's defense since 25 March; furthermore, defendant did not offer evidence that counsel's performance at trial or prior to trial was in any way deficient.

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**State v. Teasley**

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**5. Criminal Law § 42— items connected with crime—admissibility**

There was no merit to defendant's contention that \$5,900 in U. S. currency, rolling papers and pipe, electric digital scales, a triple beam balance scale, a water bong, a plastic bag containing white powder, an airline bag in which the white powder was found, and a briefcase with documents should have been excluded because none of the items were relevant to the crimes of trafficking in cocaine or assault on a fireman with which he was charged.

**6. Narcotics § 4— substances mixed by investigating officer—possession of cocaine weighing between 200 and 400 grams—sufficiency of evidence**

In a prosecution of defendant for trafficking in cocaine there was no merit to defendant's contention that a large plastic bag of white powder containing cocaine and found in his living room was rendered inadmissible by the officer's mixing at the time of the search the powder and rock found on a glass table into the bag which was found 18 inches away in a soldering iron box, since, on the evidence presented, it was for the jury to decide whether defendant possessed a mixture of cocaine weighing more than 200 but less than 400 grams.

**7. Narcotics § 3.1— chain of custody of material found in defendant's residence**

Evidence on chain of custody was sufficient reasonably to support the conclusion that white powder analyzed by an SBI chemist was the same as that discovered by an officer in defendant's residence.

**8. Assault and Battery § 14— assault on fireman—knowledge that victim was fireman—sufficiency of evidence**

In a prosecution of defendant for assault on a fireman evidence was sufficient to show that defendant knew or had reasonable grounds to know that the victims were firemen where it tended to show that two of the three vehicles in which the volunteer firemen arrived were displaying rotating red lights; one of the firemen was wearing a jacket which bore fire department insignia; and two of the three firemen verbally identified themselves to defendant as firemen called to extinguish the barn fire.

**9. Criminal Law § 138.14— presumptive sentences imposed—no findings as to aggravating and mitigating factors required**

Where the trial court imposed presumptive terms for all offenses of which defendant was convicted, it had no duty to make findings regarding aggravating and mitigating factors.

**10. Narcotics § 5— sentence—no reduction for help in convicting other drug traffickers**

There was no merit to defendant's contention that the trial court erred by finding that he did not qualify for a reduction of his sentence for trafficking in cocaine pursuant to N.C.G.S. § 90-95(h)(5) because he provided substantial assistance in identifying, arresting, or convicting others involved in drug trafficking, since defendant did not specifically contend that he provided substantial assistance but instead maintained that, because the court did not grant the motion to continue the trial, he was denied a sufficient opportunity to provide authorities with information on drug trafficking.

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State v. Teasley

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**11. Narcotics § 6— money taken from defendant at time of arrest— forfeiture improper**

In a prosecution of defendant for trafficking in cocaine the trial court erred in ordering that \$5,900 in U. S. currency found on defendant's person at the time of his arrest should be forfeited to the State under N.C.G.S. § 90-112 (a)(2), since mere possession of a large amount of money, together with narcotics, does not subject defendant to the forfeiture provision of the statute.

APPEAL by defendant from *Gudger, Judge*. Judgments entered 26 September 1985 in Superior Court, HENDERSON County. Heard in the Court of Appeals 10 June 1986.

Defendant was tried on indictments charging him with one count of trafficking in cocaine and three counts of assault on a fireman. The State's evidence tended to show, in pertinent part, that:

On 21 March 1985 the Mills River Volunteer Fire Department received a call stating that a barn was on fire. Volunteer firemen responded by proceeding to the barn, which was located on defendant's property near his dwelling. When the firemen arrived they saw defendant on the balcony of his house. Defendant asked who they were and what they were doing, to which they responded that they were firemen called to extinguish the fire. Defendant asked them to produce some identification. When they responded that they did not have any, defendant went inside his house and returned several minutes later brandishing a shotgun or a rifle. Defendant aimed the gun at the firemen and told them to get off his property because they were trespassing.

The firemen contacted the Henderson County Sheriff's Department, and several deputies soon arrived. While several deputies engaged defendant in conversation, several others entered the residence, apprehended defendant, and arrested him.

Officer Lawing, a detective with the Henderson County Sheriff's Department, entered the residence to assist the deputies. He checked the downstairs area for other possible suspects or armed persons. While inside, he observed a small quantity of white crystalline powder and some congealed matter of the white powder in the midst of the white powder (a "rock") on a glass table in the living room.



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State v. Teasley

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Based on this observation and other items, Officer Lawing obtained a search warrant and returned to defendant's residence to conduct a more thorough search. It appeared to him that the powder and "rock" on the glass table had not been disturbed since the time of arrest. He estimated that there was about a gram of powder and that the "rock" weighed about a gram as well. He inspected the general area around the table but saw nothing. He then looked in a record shelf that held cassette tapes and that was located approximately twelve to eighteen inches from the glass table. He found a soldering iron box in the record shelf which contained a large plastic bag containing a white crystalline substance which he believed to be cocaine. He also believed that this bag had been opened and closed several times. He took this bag over to the glass table and added the gram of powder and the "rock" to it, thereby mixing the powders together.

The State introduced, and the court admitted, the bag containing the mixed powders. A forensic chemist for the State Bureau of Investigation testified that in this bag were 313 grams of white powder containing cocaine. The State's expert opined that the cocaine represented "[a]nywhere from 5 to 65 percent" of the total contents of the bag based on his testing.

The jury returned verdicts of guilty on all charges. From judgments of imprisonment, defendant appeals.

*Attorney General Thornburg, by Special Deputy Attorney General David S. Crump, for the State.*

*Elmore & Powell, P.A., by Stephen P. Lindsay and Bruce A. Elmore, Sr., for defendant appellant.*

WHICHARD, Judge.

Defendant contends the court erred by failing to grant his motion to suppress evidence seized pursuant to the search of his house. Specifically, he contends that the magistrate lacked a substantial basis for concluding that probable cause existed justifying issuance of a search warrant. He argues that "[t]he allegations of Officer Lawing [in the search warrant application] were a combination of conclusions, multiple level hearsay, uncorroborated informant information and irrelevancies . . . ."

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State v. Teasley

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Officer Lawing's affidavit reads:

ON DECEMBER 3, 1984 THIS APPLICANT RECEIVED INFORMATION FROM [AN S.B.I. AGENT] THAT RUSSELL WILLIAM TEASLEY OF HORSE SHOE HAD BEEN INVOLVED IN A COCAINE TRAFFICKING INCIDENT IN RALEIGH, N.C. AND THAT THIS AGENCY SHOULD BE MADE AWARE OF THIS INFORMATION. THIS APPLICANT RECEIVED INFORMATION ON MARCH 20, 1985 FROM . . . THE N.C. ATTORNEY GENERAL'S OFFICE IN RALEIGH, N.C. THAT RUSSELL WILLIAM TEASLEY OF SUNSET CAMPGROUND, HORSE SHOE, N.C. HAD CALLED [THAT OFFICE] AND STATED THAT HE WAS "DEALING" COCAINE AND THAT [THERE] WERE SOME PEOPLE TRYING TO KILL HIM . . . [AND] [FURTHER] STATED TO THIS APPLICANT THAT MR. TEASLEY WAS A KNOWN COURIER FOR A SUBJECT IN THE CHAPEL HILL, N.C. AREA.

MARCH 21, 1985 THIS AGENCY'S COMMUNICATIONS SECTION RECEIVED A RADIO BROADCAST ON THE FIRE DEPARTMENT FREQUENCY THAT THERE WAS A BARN ON FIRE AT THE LOCATION DESCRIBED AND UPON ARRIVAL OF MEMBERS OF THE MILLS RIVER [VOLUNTEER] FIRE DEPT. AT 5:33 P.M. THAT A WHITE MALE SUBJECT NAMED TEASLEY HAD PREVENTED [THEIR] RESPONSE AS THIS SUBJECT [ASSAULTED] MEMBERS OF THIS FIRE DEPT. BY POINTING A LONG [SHOULDER] TYPE WEAPON AT THEM. THE FIRE DEPT. CALLED THIS AGENCY FOR ASSISTANCE. UPON [ARRIVAL] AT THE [AFOREMENTIONED] LOCATION THIS APPLICANT OBSERVED A WHITE MALE SUBJECT [CARRYING] A LONG SHOULDER TYPE WEAPON TO THE BEIGE FORD RANCHERO TRUCK AS DESCRIBED AND THEN ENTER THE RESIDENCE DESCRIBED. THIS SUBJECT WAS IDENTIFIED TO THIS APPLICANT AS BEING RUSSELL W. TEASLEY. THIS SUBJECT SHOUTED [OBSCENITIES] AT RESPONDING OFFICER OF THIS AGENCY. WARRANTS WERE ISSUED BY MAGISTRATE DERMID [FOR] ASSAULTING A FEMALE, IN WHICH TEASLEY HAD ASSAULTED HIS WIFE PREVIOUS TO THIS INCIDENT. OFFICER[S] APPROACHED THIS RESIDENCE AND TEASLEY CAME OUT ONTO A SECOND STORY BALCONY AND REFUSED TO TALK WITH THE RESPONDING OFFICERS. OFFICERS ENTERED THIS RESIDENCE AND SUBDUED TEASLEY AND OBSERVED IN THIS RESIDENCE WERE VARIOUS ITEMS OF DRUG [PARAPHERNALIA], ROLLING PAPERS, PIPES, ETC.

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State v. Teasley

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WHICH WOULD BE USED TO INTRODUCE IN TO YOUR BODY CONTROLLED SUBSTANCES THAT WOULD [BE] ILLEGAL TO POSSESS.

THE STRUCTURE THAT WAS BURNING WAS OF A SUSPICIOUS NATURE AS THE WEATHER AT THE TIME WAS [CONSTANT] RAIN AND THE FACT THAT TEASLEY WOULD NOT LET THE RESPONDING FIREMEN . . . APPROACH THE SCENE TO EXTINGUISH THE FIRE.

THIS APPLICANT ALSO OBSERVED SEVERAL FIREARMS AND BOXES OF AMMUNITION INSIDE THE AFOREMENTIONED RESIDENCE ALSO LYING ON THE ROOF OF THE BEIGE FORD TRUCK ALSO DESCRIBED, [SITTING] IN THE DRIVEWAY OF THIS RESIDENCE.

During the suppression hearing, Officer Lawing testified that when he submitted his sworn statement with the search warrant application to the magistrate, he "made oral statements [under oath to the magistrate] in her office at the time of application to the fact that [he] had seen some white powder, which [he] believed to be cocaine, which [he] did not put in the original [.]"

The trial court found that:

[T]he application is a sufficient recital together with other information provided to the magistrate to warrant and justify the magistrate in issuing a search warrant for possible controlled substances; for firearms and for flammable liquid. The totality of circumstances which existed at the time the application was made including the conduct of the defendant recited in the application. The fire and other circumstances leading to the entry into the residence of the defendant following the defendant's conduct constituting or appearing to constitute felonious assault upon law enforcement officers and private personnel, appears to me to justify the act of [Officer] Lawing in applying for the warrant purports [sic] substantially each of the assertions made by him in the application and certainly warrants the issuance of the application on the basis of the information supplied to the magistrate; accordingly, it is the judgment of the Court that the search warrant was regularly and properly issued and the motion to suppress is denied.

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*State v. Teasley*

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The only supplemental information is that [Officer] Lawing states that he testified under oath to the magistrate to observing a white powder and [the court] considered that the magistrate was privileged to consider that along with all other facts related in the search warrant application. The application itself shows quite a number of articles seen in plain view in the course of lawful arrest. [The court finds] that that information contained in this search warrant justified the issuance of the search warrant on [its] face alone [, even disregarding Officer Lawing's additional statement].

This Court has stated that:

The scope of our review is to determine whether these findings are supported by competent evidence and whether they support the conclusion of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E. 2d 618, 619 (1982). "[T]he duty of a reviewing court [the trial court, initially] is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed. 2d 527, 548 (1983), citing *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed. 2d 697 (1960) . . . .

In resolving that issue first we determine whether information presented to the magistrate complies with G.S. 15A-244. See *State v. Arrington*, 311 N.C. 633, 636, 319 S.E. 2d 254, 256 (1984). Only information that so complies may support a magistrate's decision that probable cause exists to issue a search warrant. Second, we examine the information properly available to the magistrate to see whether it provides a sufficient basis for finding probable cause and issuing a search warrant. We examine that information under the "totality of circumstances" test reaffirmed by the Supreme Court of the United States in *Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527, and adopted by our Supreme Court in *Arrington*, 311 N.C. at 643, 319 S.E. 2d at 261, for resolving questions arising under Article I, Section 20 of the Constitution of North Carolina with regard to the sufficiency of probable cause to support the issuance of a search warrant.

Under our statutes a magistrate issuing a warrant can base a finding of probable cause only on statements of fact

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State v. Teasley

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confirmed by oath or affirmation of the party making the statement, or on information which the magistrate records or contemporaneously summarizes in the record. G.S. 15A-244; G.S. 15A-245(a). The necessity of a sworn statement is consistent with existing case law. *See, e.g., Gates*, 462 U.S. at 238, 103 S.Ct. at 2332, 76 L.Ed. 2d at 548 ("The task of the issuing magistrate is simply to make a practical, common-sense decision . . . given all the circumstances set forth in the affidavit before him . . .") (emphasis supplied).

*State v. Heath*, 73 N.C. App. 391, 393, 326 S.E. 2d 640, 642 (1985).

[1] Unlike in *State v. Hicks*, 60 N.C. App. 116, 298 S.E. 2d 180 (1982), *disc. rev. denied*, 307 N.C. 579, 300 S.E. 2d 553 (1983), the evidence here does not show that the magistrate recorded or contemporaneously summarized in the record Officer Lawing's statement to her that he had observed some white powder which he believed to be cocaine. *Hicks*, 60 N.C. App. at 118-21, 298 S.E. 2d at 182-83. The magistrate's additional information thus was not recorded as required by N.C. Gen. Stat. 15A-245(a). *Id.* at 121, 298 S.E. 2d at 183. Accordingly, under our statutory requirements the issuance of the warrant must rest solely upon Officer Lawing's affidavit. *See Heath*, *supra*, 73 N.C. App. at 395, 326 S.E. 2d at 643.

[2] Examining this affidavit within the guidelines adopted in *Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527, and *Arrington*, 311 N.C. 633, 319 S.E. 2d 254, we hold that it provides a substantial basis for concluding that probable cause existed. Defendant contends the affidavit is insufficient upon its face because it is based, in part, on false statements. The incident in Raleigh related by the S.B.I. agent, according to defendant, really involved "a small amount of marijuana . . . insufficient to constitute a trafficking violation . . ." and did not involve cocaine trafficking as alleged in the affidavit. Further, the information from the Attorney General's office was really to the effect that defendant "had basically admitted that he was dealing in cocaine . . ." by failing to deny this fact in his conversation with that office. Defendant argues that Officer Lawing thus misrepresented this communication in his affidavit by stating that the Attorney General's office told him that defendant was "dealing" cocaine.

Assuming, *arguendo*, that under the standard set forth in *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 2676, 57

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State v. Teasley

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L.Ed. 2d 667, 672 (1978), we must disregard these statements as false, we nevertheless "find that there was probable cause to support the search warrant on the face of the affidavit when this false information is disregarded." *State v. Louchheim*, 296 N.C. 314, 321, 250 S.E. 2d 630, 635, *cert. denied*, 444 U.S. 836 (1979). The affidavit specifically alleges the following key facts:

(1) Defendant assaulted members of the Mills River Volunteer Fire Department by pointing a long shoulder type weapon at them and thereby preventing them from approaching his barn to extinguish a fire.

(2) Upon entering the residence to arrest defendant, the arresting officers observed various types of drug paraphernalia, rolling papers, and pipes used to introduce illegal, controlled substances into the body.

(3) Defendant was a known drug courier for someone in the area of Chapel Hill, North Carolina.

We hold that these facts provided the magistrate with a substantial basis for concluding that there was probable cause to believe that evidence of a crime would be discovered in defendant's house. *State v. Moore*, 79 N.C. App. 666, 672, 340 S.E. 2d 771, 776 (1986); *Heath, supra*, 73 N.C. App. at 393, 326 S.E. 2d at 642. Accordingly, the court did not err in denying defendant's motion to suppress.

[3] Defendant contends the court erred in failing to grant his motion to discover his prior criminal record. In support of this contention he cites N.C. Gen. Stat. 15A-903(c) which provides: "Defendant's Prior Record.—Upon motion of the defendant, the court must order the State to furnish to the defendant a copy of his prior criminal record, if any, as is available to the prosecutor."

The record shows that defendant filed a motion for court-ordered discovery regarding his criminal record. The prosecutor indicated that he did not know of a criminal record and did not intend to use one. Counsel for defendant indicated that he had attempted to obtain defendant's criminal record from the Wake County Clerk of Superior Court without success.

The court ruled as follows:

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State v. Teasley

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We will see where we are on that, if [the court enters] an order requiring this production before impanelling the jury for the trial of the action that would protect you fully, [the court thinks], for purpose of negotiation and also perhaps for purposes of cross[-]examination and for the purpose of knowing what is [forthcoming].

The court thus did not deny, but apparently granted, defendant's motion. The record does not indicate any renewed requests by defense counsel for a criminal record or further orders. The State made no use of any criminal record at trial or sentencing. Defendant thus has failed to show any prejudice. N.C. Gen. Stat. 15A-1443. Accordingly, this assignment of error is overruled.

[4] Defendant contends he was denied effective assistance of counsel because the court denied his motion for a continuance. We disagree.

On 18 September 1985 defense counsel moved for a continuance alleging that defendant had retained him on 17 September 1985 and that he had not had an opportunity to prepare a defense. However, the record shows that defense counsel had been involved in defendant's defense since 25 March 1985, three days after defendant's arrest. On 25 March 1985 counsel filed an affidavit and motion seeking to have defendant committed to a state mental health facility for observation. On 2 May 1985 counsel, "limiting his appearance to District Court in this matter . . .," filed a motion asserting defendant's incapacity to proceed. On 6 June 1985 counsel gave notice, by way of limited appearance, of his intention to assert an insanity defense. On 15 August 1985 counsel entered a limited appearance for the purpose of making a motion for discovery.

Further, defendant has not offered evidence that counsel's performance at trial or prior to trial was in any way deficient. He thus has failed to show that his counsel's conduct fell below an objective standard of reasonableness. *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E. 2d 241, 248 (1985), citing *Strickland v. Washington*, 466 U.S. 686, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). He has not satisfied the *Strickland* two-prong test for establishing ineffective assistance. See *id.* at 562, 324 S.E. 2d at 248. Accordingly, this assignment of error is overruled.

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*State v. Teasley*

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[5] Defendant contends the court erred by admitting, over objection, State's exhibits two, five, six, seven, eight, ten, eleven and twelve, which included \$5,900 in United States currency, rolling papers and pipe, electric digital scales, a triple beam balance scale, a water bong, a plastic bag containing white powder, an airline bag in which the white powder was found and a briefcase with documents. He argues that none of these items were relevant to the crimes of trafficking in cocaine or assault on a fireman and that they thus should have been excluded under N.C. Gen. Stat. 8C-1, Rules 401, 402, and 403. We disagree.

Our Supreme Court recently stated:

"[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" is relevant. N.C.G.S. Sec. 8C-1, Rule 401. Relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. Sec. 8C-1, Rule 403. Unfair prejudice has been defined as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Commentary to N.C. R. Evid. 403. Whether or not to exclude evidence under Fed. R. Evid. 403 is a matter within the sound discretion of the trial judge. [Citation omitted.]

*State v. Mason*, 315 N.C. 724, 731, 340 S.E. 2d 430, 434-35 (1986). We hold that the aforementioned exhibits, with the exception of the briefcase, were relevant to the crime of trafficking in cocaine in that they tended to show that defendant knowingly possessed cocaine and was trafficking in it. The briefcase was in defendant's possession at the time of arrest and tended to explain or illustrate the circumstances surrounding his arrest. We perceive no "danger of unfair prejudice" that substantially outweighed the probative value of these exhibits. Accordingly, this assignment of error is overruled.

[6] Defendant contends the court erred by admitting, over objection, State's exhibit nine, the large plastic bag of white powder containing cocaine found in his living room. Specifically, he argues



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State v. Teasley

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that Officer Lawing rendered this exhibit inadmissible by mixing the powder and rock found on the glass table into the bag from the soldering iron box at the time of the search. He argues that mixing the powders constituted a material change in the condition of the exhibit between the time of the alleged crime and the trial, and that the court erred in failing to grant his motion to dismiss the charge of trafficking in cocaine because the State failed to present sufficient evidence of drug quantity due to the mixing of the powders.

Underlying these contentions is a concern that only the powder and rock on the glass table, and not the large plastic bag found in the soldering iron box, contained cocaine prior to the mixing. The State's expert witness, a forensic chemist for the State Bureau of Investigation, in essence acknowledged that his testing could not determine conclusively that both the large bag of powder and the powder on the table contained cocaine prior to the mixture. Therefore, since the powder in the bag could have been a non-controlled substance prior to the mixing and testing, defendant argues that (1) the powder in this bag was "tainted" prior to testing by the addition of the powder from the table and thereby rendered inadmissible and (2) the State failed to present sufficient evidence that he possessed a cocaine mixture weighing between 200 and 400 grams as required for conviction under N.C. Gen. Stat. 90-95(h)(3)(b), since all of the cocaine could have been on the table in a pile weighing only approximately two grams.

In *State v. Hayes*, 291 N.C. 293, 230 S.E. 2d 146 (1976), as summarized in *State v. Anderson*, 76 N.C. App. 434, 333 S.E. 2d 762 (1985),

the chemist visually examined nineteen envelopes of vegetable matter seized from the defendant and determined that the contents were the same. He then examined chemically and microscopically the contents of five of the envelopes selected at random and identified the contents as marijuana. The Court found that "there was sufficient evidence to go to the jury on the question of whether all the envelopes contained marijuana." *Id.* at 302, 230 S.E. 2d at 151-52.

*Anderson*, 76 N.C. App. at 437, 333 S.E. 2d at 764-65.

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State v. Teasley

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In *Anderson* the defendant, like the defendant in *Hayes*, contended that the evidence was not sufficient to convict him of trafficking in heroin by either possession or sale because only three of fourteen packets of powder were chemically analyzed and the weight of the analyzed powders was under one gram although the total weight of all fourteen packets was in excess of six grams. Over four grams of a mixture containing heroin was required for conviction. Following *Hayes, supra*, this Court held that testimony by an S.B.I. forensic chemist that in his opinion all fourteen packets contained heroin, even though only three packets were chemically analyzed, "allowed the jury to determine that all the packets contained heroin." *Anderson*, 76 N.C. App. at 438, 333 S.E. 2d at 765.

In *State v. Horton*, 75 N.C. App. 632, 331 S.E. 2d 215, cert. denied, 314 N.C. 672, 335 S.E. 2d 497 (1985), defendant sold six tin-foil packets containing white powder to an undercover agent. When the contents of all six packets were dumped together for testing purposes they weighed 6.65 grams, and this combined mixture contained heroin. This Court held this evidence sufficient to support defendant's conviction of trafficking in heroin by possessing and selling more than four grams of a heroin mixture, notwithstanding defendant's contention that all of the heroin could have been in one packet whose contents weighed no more than one gram and a fraction. *Horton*, 75 N.C. App. at 633-34, 331 S.E. 2d at 216. See also *State v. Dorsey*, 71 N.C. App. 435, 322 S.E. 2d 405 (1984).

Defendant correctly notes that, unlike the substances in *Horton* and *Dorsey*, the substances here were not found "together." The large quantity of white powder was found in a sealed plastic bag in a soldering iron box in a stereo shelf located approximately a foot and a half from the glass table on which the smaller portion lay. We further note that here an officer conducting an investigation at the crime scene combined the substances, not a chemist conducting a chemical analysis in the laboratory as in *Horton* and *Dorsey*.

While we do not commend such a practice by law enforcement officers, and while defendant's arguments are not without substance, we believe that pursuant to *Hayes* and its progeny our Supreme Court would hold that on the evidence presented it was

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State v. Teasley

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for the jury to decide whether defendant possessed a mixture of cocaine weighing more than 200 but less than 400 grams. We thus hold that State's exhibit nine was properly admitted and permitted a jury determination that defendant possessed the requisite quantity of cocaine.

[7] Defendant contends the court erred in admitting State's exhibits nine and ten because the State failed to establish the requisite chain of custody. We disagree.

Officer Lawing testified that he took the two bags containing white powder (exhibits nine and ten) from defendant's residence to the Henderson County Sheriff's Department, where he tagged and identified them by case number and placed them in a narcotics safe. He next transported the bags to the S.B.I. lab where he placed them in a lock box to await analysis. The S.B.I. forensic chemist testified that he took the bags from the lock box to analyze them. The chemist testified that he held the only key to this lock box. After analyzing the contents, the chemist gave the bags to Officer Norton of the Hendersonville Police Department, who delivered them directly to Officer Lawing at the Henderson County Sheriff's Department.

We hold that this evidence "is sufficient to reasonably support the conclusion that the substance analyzed [was] the same as that obtained from defendant [and therefore] both the substance and the results of the analysis [were properly] admissible." *State v. Callahan*, 77 N.C. App. 164, 168, 334 S.E. 2d 424, 427 (1985). In *Callahan* this Court held that the evidence was sufficient to establish a proper chain of custody as to a white powder. There, a S.L.E.D. agent placed a red seal on the envelope containing the white powder, initialed it, and delivered it to the S.L.E.D. lab. The S.L.E.D. chemist obtained this envelope from his personal locker, to which the chief chemist also had a set of keys. When the chemist obtained the envelope, the red seal was unbroken. The court concluded that this evidence was sufficient reasonably to support the conclusion that the substance analyzed was the same as that obtained from defendant. *Id.*

While the evidence on chain of custody is less complete here than in *Callahan*, it is sufficient reasonably to support the conclusion that the substance analyzed was the same as that discovered by Officer Lawing in defendant's residence. *Id.* See also *State v.*

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**State v. Teasley**

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*Sessoms*, 79 N.C. App. 444, 339 S.E. 2d 458 (1986). As in *Callahan*, weaknesses in the chain of custody go to the weight rather than the admissibility of the evidence. *Id.*

Defendant also contends the chain of custody for State's exhibit nine is incomplete because Officer Lawing mixed the powder and rock from the glass table with the contents of the large plastic bag found in the soldering iron box. This contention is essentially the same as defendant's "material change in condition" argument, *supra*, and it fails for the reasons set forth in discussing that argument.

[8] Defendant contends the court erred in failing to grant his motion to dismiss the charges of assault on a fireman. Specifically, he argues that there was no evidence that he knew the victims were firemen when they came on his property to extinguish the barn fire. We disagree.

N.C. Gen. Stat. 14-34.2 provides, in pertinent part: "Any person who commits an assault with a firearm or any other deadly weapon upon any . . . [f]ireman . . . in the performance of his duties shall be guilty of a Class I felony." Knowledge is an essential element of this offense. *State v. Avery*, 315 N.C. 1, 31, 337 S.E. 2d 786, 803 (1985). Specifically, conviction under N.C. Gen. Stat. 14-34.2 requires "not only that the jury find that the victim was a [fireman] but also that the defendant 'knew or had reasonable grounds to know' that the victim was a [fireman]." *Id.*

The evidence here shows that two of the three vehicles in which the volunteer firemen arrived were displaying rotating red lights, one of the firemen was wearing a jacket which bore fire department insignia, and two of the three firemen verbally identified themselves to defendant as firemen called to extinguish the barn fire. We hold this evidence sufficient to show that defendant knew or had reasonable grounds to know that the victims were firemen. Accordingly, this assignment of error is overruled.

Defendant contends the court erred by improperly instructing the jury. There was, however, no objection to the instructions at trial as required by N.C. R. App. P. 10(b)(2). Defendant argues, nevertheless, that there was "plain error" mandating a new trial. See *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). We disagree.

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State v. Teasley

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Plain error is to be applied only “‘in the exceptional case where, after reviewing the entire record, it can be said that the claimed error is a “*fundamental error . . .*”’” *Odom*, 307 N.C. at 660, 300 S.E. 2d at 378. “[I]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.” *Id.* at 661, 300 S.E. 2d at 378.

Defendant contends the court, in its summary of the State’s evidence, incorrectly stated that the firemen told defendant that “they were firemen; that they displayed their uniforms, that their uniforms had firemen’s markings on them . . . .” According to defendant the evidence shows that none of the firemen was wearing a uniform except for one who was wearing a jacket with a patch indicating he was a volunteer fireman, and thus no uniforms were displayed to defendant. Defendant also maintains that, while the court summarized the State’s evidence, it did not summarize his evidence; specifically, he argues that the court failed to instruct that Officer Lawing mixed the powders at the crime scene, that defendant was under the influence of drugs at the time of the alleged criminal activity, or that, as defendant contends, the firemen were not wearing uniforms and had no identification.

We hold that this is not “the rare case” warranting reversal in the absence of a proper objection at trial. *Id.* Our review of the whole record fails to convince us that these alleged errors in the instructions “tilted the scales” and caused the jury to reach its verdict convicting defendant. *State v. Walker*, 316 N.C. 33, 39, 340 S.E. 2d 80, 83 (1986). *State v. Sanders*, 298 N.C. 512, 259 S.E. 2d 258 (1979), and *State v. Pryor*, 59 N.C. App. 1, 295 S.E. 2d 610 (1982), cited by defendant, antedate the plain error analysis which our Supreme Court introduced in *Odom*. Accordingly, this assignment of error is overruled.

[9] Defendant contends the court erred by failing to find several mitigating factors offered by defense counsel at the sentencing hearing. Citing *State v. Gardner*, 312 N.C. 70, 320 S.E. 2d 688 (1984) and *State v. Heath*, 77 N.C. App. 264, 335 S.E. 2d 350 (1985), he argues that the court was under a duty to make certain findings in mitigation. However, N.C. Gen. Stat. 15A-1340.4(b) provides, in pertinent part, that “a judge need not make any findings regarding aggravating and mitigating factors if he . . . imposes

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State v. Teasley

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the presumptive term . . . ." The court imposed presumptive terms for all offenses of which defendant was convicted. It thus had no duty to make findings regarding aggravating and mitigating factors. The cases cited by defendant involved sentences of either greater or lesser terms than the presumptive and are therefore inapplicable. *Gardner*, 312 N.C. at 71, 320 S.E. 2d at 689; *Heath*, 77 N.C. App. at 272, 335 S.E. 2d at 355-56. Accordingly, this assignment of error is overruled.

[10] Defendant contends the court erred by finding that he did not qualify for a reduction of his sentence for trafficking in cocaine pursuant to N.C. Gen. Stat. 90-95(h)(5). N.C. Gen. Stat. 90-95(h)(5) permits the court to reduce a defendant's sentence when that defendant "has . . . provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals . . . ." Defendant does not specifically contend that he provided substantial assistance. Rather, citing *State v. Perkerol*, 77 N.C. App. 292, 335 S.E. 2d 60 (1985), he maintains that because the court did not grant his motion to continue the trial, he was denied a sufficient opportunity to provide authorities with information on drug trafficking.

In *Perkerol* the defendant offered to provide information to the District Attorney's Office on the morning of his sentencing hearing, and the Office declined the offer. *Perkerol*, 77 N.C. App. at 300, 335 S.E. 2d at 65. This Court remanded for a new sentencing hearing because one could interpret a statement by the sentencing court as an erroneous conclusion that defendant's offer of substantial assistance pursuant to N.C. Gen. Stat. 90-95(h) was not timely made. *Id.* The Court reasoned that "the statutory language 'has rendered . . . substantial assistance' commonsensically sets no time limit on when such assistance must be rendered." *Id.*

Unlike in *Perkerol*, the record here reveals no offer by defendant to provide assistance. Defendant's argument actually concerns ineffective assistance of counsel, and it fails for the reasons set forth above in our discussion of the court's denial of defendant's motion for a continuance. Accordingly, this assignment of error is overruled.

[11] Defendant contends the court erred in ordering that \$5,900 in United States currency found on his person at the time of his

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**Hartman v. Hartman**

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arrest should be forfeited to the State under N.C. Gen. Stat. 90-112(a)(2). We agree.

N.C. Gen. Stat. 90-112(a)(2) provides: "The following shall be subject to forfeiture: . . . All money, raw material, products, and equipment of any kind which are acquired, used, or intended for use, in selling, purchasing, manufacturing, compounding, processing, delivering, importing, or exporting a controlled substance in violation of the provisions of this Article[.]" In *State v. McKinney*, 36 N.C. App. 614, 244 S.E. 2d 455 (1978), this Court expressly rejected the notion that currency could be subject to forfeiture under N.C. Gen. Stat. 90-112 "solely by virtue of being found in 'close proximity' to the controlled substance which the defendant was convicted of possessing." *McKinney*, 36 N.C. App. at 617, 244 S.E. 2d at 457. The State concedes that there is no evidence here showing that the money was "acquired, used or intended for use . . ." in violation of N.C. Gen. Stat. 90-112(a) except for the fact that defendant possessed "a large quantity of cash at the time that he possessed a large quantity of narcotics . . . ."

Following the rationale of *McKinney*, mere possession of a large amount of money, together with narcotics, does not subject defendant to the forfeiture provision of N.C. Gen. Stat. 90-112. We thus hold that the court erred in ordering the forfeiture.

No error in the trial; order of forfeiture vacated.

Judges PHILLIPS and MARTIN concur.

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RALEIGH WILBUR HARTMAN v. ELSIE H. HARTMAN

No. 8621DC39

(Filed 5 August 1986)

**1. Divorce and Alimony § 30— equitable distribution of marital property—husband's interest in cemetery**

In a proceeding for equitable distribution of marital property, the evidence was sufficient to support the trial court's determination as to the ownership interest held by plaintiff in a cemetery where the court determined that plaintiff owned 1,118 shares of stock and plaintiff's son owned 684 shares of stock; the father served as a conduit for the son's purchase of the stock; plain-

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**Hartman v. Hartman**

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tiff had the power to transfer only the 1,118 shares of stock; it was never contemplated by anyone involved with the sale of the 684 shares of stock that plaintiff would purchase it and then retain ownership thereof; and the son paid the seller directly for the stock, at which time it was transferred to his name.

**2. Divorce and Alimony § 30— equitable distribution of marital property—husband's interest in cemetery—valuation of stock**

In a proceeding for equitable distribution of marital property the trial court's findings pertaining to the valuation of stock owned by plaintiff were supported by the evidence where the expert testimony and evidence upon which the trial court based its calculations was to the effect that the value of plaintiff's 1,118 shares of stock should be valued as those of a minority interest holder due to his inability to convey a majority of the shares of outstanding stock in the corporation; generally the value of stock interests representing less than control are normally discounted 30 to 50 percent; plaintiff's expert was the only expert who testified on the process of valuing stock held in a closely-held corporation; and the court considered the selling price of the stock in 1981 and 1983, the restrictions on the shares of stock as stated in the corporation's bylaws, the limited marketable capacity of the minority stock of the corporation and the fact that the corporation had never been able to pay substantial dividends.

**3. Divorce and Alimony § 30— equitable distribution of marital property—all of corporate stock awarded to one party—no error**

Due to the nature of the management of a closely-held corporation such as the one in question, there was no abuse of discretion by the trial court in a proceeding for the equitable distribution of marital property in awarding all of the stock in the corporation to one of the parties.

**4. Divorce and Alimony § 30— equitable distribution of marital property—items of greater value awarded to one party—distribution proper**

There was no merit to defendant's contention that she was substantially prejudiced by the court's distribution of marital property because plaintiff was awarded items of property valued at more than twice what the items of property were which were awarded to defendant, since the court, in order to make the distribution equitable, required plaintiff to pay the mortgage on the former homeplace of the parties and required him to make a lump sum payment to defendant.

**5. Deeds § 11; Divorce and Alimony § 30— equitable distribution of marital property—interest of parties in lake house—court's going outside face of deed improper**

The trial court erred in considering parol evidence and determining that the parties to a proceeding for equitable distribution of marital property owned a one-half interest in a lake house and lot rather than a one-third interest, since there were no findings or conclusions which would warrant the trial court's going outside the face of the deed to construe the subject conveyance, and the conveyance was to one individual grantee and two sets of husbands and wives.

Judge WEBB dissenting.



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**Hartman v. Hartman**

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APPEAL by defendant and cross-appeal by plaintiff from *Gatto, Judge*. Judgment entered 4 October 1985 in District Court, FORSYTH County. Heard in the Court of Appeals 3 June 1986.

The parties appeal from a judgment distributing marital property pursuant to the Equitable Distribution Act, G.S. 50-20.

*Morrow & Reavis, by John F. Morrow and Clifton R. Long, Jr., for plaintiff appellant.*

*Petree, Stockton & Robinson, by W. Thompson Comerford, Jr. and Jane C. Jackson, for defendant appellant.*

JOHNSON, Judge.

Plaintiff Raleigh Wilbur Hartman and defendant Elsie H. Hartman were married on 28 June 1947. Two children, Sue Ann and Raleigh Wilbur Hartman, Jr. ("Buddy"), were born of this marriage. On 22 January 1982, the parties separated. At the time of the parties' separation both the parties' children were emancipated. An absolute divorce was entered in Forsyth County District Court on 12 December 1983; pursuant to court order, the equitable distribution claim was severed from the divorce claim for later trial.

DEFENDANT'S APPEAL

The trial court, sitting as the trier of fact, found in pertinent part, the following: Neither the plaintiff nor defendant owned any separate property. At the time of trial defendant was employed at Crestview Memorial Gardens; that plaintiff was employed at Gardens of Memory, Inc. As of the date of the parties' separation, Gardens of Memory, Inc., a closely held corporation in the cemetery business, had 2,568 outstanding shares of common stock. The fair market value of the corporation is approximately \$401,407.00. The corporation originally issued 3,250 shares. Plaintiff as an original investor in 1960 was the purchaser of 684 shares and subsequently in January of 1981, plaintiff purchased 434 shares at \$40.00 per share from another original investor, J. C. Fulp. Plaintiff owned 1,118 shares of stock free and clear from any individual or legal obligation. The value of plaintiff's stock is \$100.00 per share for a total value of \$118,000.00. Approximately one year prior to the parties' separation, in early 1981, James C. Fulp and his wife, Dorothy Fulp, went to plaintiff and informed him of their

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**Hartman v. Hartman**

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desire to sell 684 shares of stock in Gardens of Memory, Inc. to plaintiff's son, R. W. Hartman, Jr.; however, they informed plaintiff that they realized that his son was not financially capable to purchase their stock. On 6 January 1981, plaintiff executed a purchase agreement for the Fulps' 684 shares of stock for \$30,000.00. The terms of the purchase agreement were \$7,500.00 down and that plaintiff execute a promissory note for \$22,500.00, secured by a pledge and assignment of stock; that the \$22,500.00 note was payable with interest of 12% per annum and was payable in four equal installments of \$5,625.00 with the first payment due 6 January 1982. On 18 February 1981, plaintiff and his son, executed an agreement for plaintiff to sell the recently acquired 684 shares of stock to his son with the following terms: \$500.00 as a cash down payment, \$7,000.00 as a payment due on or before 6 January 1987, and \$22,500.00 plus interest of 12% per annum being due and payable in four equal installments of \$5,625.00 each, with the first payment due 6 January 1982. This agreement recited that the 684 shares were pledged to the Fulps as security for plaintiff's 6 January 1981 note to the Fulps. Defendant's sister as of 22 January 1982 was the owner of 600 shares of Gardens of Memory, Inc. stock; 165 shares of said corporation's stock was owned by William Huffstetler, II, but in 1983 said stock was sold to plaintiff's son for \$40.00 per share.

[1] Defendant first contends that the trial judge erred as a matter of law in determining the ownership interest held by plaintiff in Gardens of Memory, Inc. and in his valuation of plaintiff's stock in said corporation. We disagree.

The standard of our review for domestic law cases, as stated by this Court, is as follows:

Our trial courts have broad discretionary powers in domestic law cases. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason, or that its ruling could not have been the result of a reasoned decision. Only when the evidence fails to show *any* rational basis for the distribution ordered by the court will its determination be upset on appeal. Further, when an appellant contends the findings of fact are not supported by the evidence, we look to see whether the findings are supported by *any* competent evidence in the record.

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Hartman v. Hartman

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*Nix v. Nix*, 80 N.C. App. 110, 112, 341 S.E. 2d 116, 118 (1986) (emphasis in original) (citations omitted). Defendant first argues that the conveyance of stock from plaintiff to his son was a "sham" and therefore plaintiff held 1,802 shares of stock, a majority share, not 1,118 shares as the trial court found. By this assertion defendant challenges the value of each share plaintiff owned by virtue of plaintiff being able to sell a majority share, and the value of the stock owned by plaintiff according to the amount of shares (registered in plaintiff's name). Defendant alleges that the evidence presented to the trial court showed that plaintiff exercised control over the disputed stock; and that the stock continued to be registered in plaintiff's name until 1985. Defendant further alleges that the alleged sale of stock by plaintiff to his son cannot withstand our scrutiny. We disagree.

Defendant, in her presentation of evidence, did not establish that the stock sale entered into between plaintiff and the parties' son was fraudulent. The contract has not been voided in any previous action and the legal effect of said document remains intact. The trial court, as alluded to, *supra*, specifically found as fact the following:

While plaintiff was the title owner of said 684 shares of stock on the date of separation, the plaintiff did have a legal obligation to sell said stock to the son of the parties for the same amount of money that the plaintiff owed for the purchase of said stock; that for this reason, the Court does not place a net value on said 684 shares of stock as the *plaintiff had a legal obligation at the time of separation to sell said stock*, as the plaintiff has sold said stock since the separation pursuant to said legal obligation, and as the stock was sold to the parties' son for the amount the plaintiff owed on said stock at the time of the parties' separation; that the Court further notes that the Court is making the \$7,000.00 note from R. W. Hartman, Jr., to the plaintiff a marital asset.

(Emphasis supplied.) As stated earlier, the court found as fact that the reason for the subject sale of stock was that plaintiff wanted his son to become an owner in Gardens of Memory, Inc. The record in the case *sub judice* supports this finding by the court sitting as the trier of fact. Testimony by Mr. Fulp, an original investor who sold the subject stock to plaintiff, was as follows:

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**Hartman v. Hartman**

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Q. Do you know how many shares of stock you all had in the company?

A. 684.

Q. Do you know know [sic] much money you paid for that stock?

A. It was \$10 a share. That'd [sic] be \$6,840.

Q. All right. Now at some point in time, did you become interested in selling that stock?

A. Yes, I did.

Q. Would you tell us how you became interested in selling the stock?

A. I was having lunch with a mutual friend of mine and the Hartmans, Mr. Bill Witherow, and he and I got to talking business and we drifted off on the cemetery which I was a stockholder in. And I told him I'd be glad to sell my shares and he said that his son and Buddy might be interested in buying it.

Q. And what was this gentleman's name?

A. C. W., Bill Witherow.

Q. All right, and when you say Buddy, who are you referring to?

A. This younger Hartman back there.

Q. Mr. Hartman's son?

A. That's right.

Later in his testimony Mr. Fulp testified with respect to his understanding of the actual stock sale as follows:

Q. Now, the note came from Mr. Hartman. Whose understanding was it—what was your understanding as to who was going to end up with the stock?

A. It was my understanding that—

Mr. Comerford: [defendant's attorney]—

Well, objection, Your Honor.

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**Hartman v. Hartman**

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Q. (Mr. Morrow) [plaintiff's attorney] Well, from your conversation with Mr. Hartman?

THE COURT: Overruled. You may answer.

THE WITNESS: It was my understanding that Mr. Hartman was buying that for Buddy. In fact, he told me he was.

Q. (Mr. Morrow) Can you tell us why you didn't just sign these contracts with Buddy?

A. Buddy didn't have the resources at that time.

Q. In other words, you financed it yourself, didn't you?

A. Yes.

Q. Now, after the \$7,500 was paid, the contract and note calls for \$5,625 per year plus interest at the rate of 12 percent per annum on the balance of \$22,500.

Were those payments made?

A. That's correct.

Q. Who made those payments?

A. Buddy Hartman.

Buddy Hartman testified as follows:

Q. When was the agreement signed?

A. February the 11th, 1981.

Q. Now, prior to signing that agreement, had you had any conversations with your father about that stock and your purchasing of it from Mr. Fulp?

A. Yes, sir, he had come to me and said that J. C. had wanted to sell his stock and that he would like for me to buy that stock, but he knew that I really didn't have the money to do that and that he would be willing to help me make payments that I couldn't make if I would—you know, if I was going to stay at the company and become interested and—and wanted to become a stockholder.

Q. And what did you tell him?

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Hartman v. Hartman

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A. I told him that, you know, I knew it would be tough but that if there was any way we could do it that I wanted to buy it.

Buddy Hartman further testified that he was making all payments to J. C. Fulp toward the purchase price as payments became due; that the stock was transferred in January of 1985, after he made the final payment to Mr. J. C. Fulp; and that a \$7,000.00 payment which is due in 1987 to be paid to plaintiff. Plaintiff's testimony corroborated the testimony by his son and Mr. Fulp as follows:

Q. (Mr. Morrow) Tell us about the conversation you had with Mr. Fulp concerning this stock.

A. And I said, yes, I would like for Buddy to have your stock if you want to sell it, J. C. And he said, well I think that—you know, that you—you—you run the company, you've done all the work here, and you—you all should have it. Buddy is helping you, he's coming on in the business, and—and that was basically the conversation.

And I said, J. C., I don't have the money to buy all the stock, and Buddy certainly doesn't have it. And he said, well, I don't want all the money. I had rather have it spread out over a period of years. And he—and I asked him what he wanted, and he said \$45 a share or something like that. And—and I said, well, I—I'll give you [\$]30,000.00 for the whole thing, you know. I think that's the conversation.

The 11 February 1981 agreement between plaintiff and his son for the sale of stock recites the following: "seller hereby agrees to do whatever is necessary to effectuate an assignment and transfer of said 684 shares of stock immediately upon payment in full of the consideration set out in section one hereinabove." We hold that the trial court's findings are supported by sufficient evidence to meet the "*any* competent evidence" standard set forth in *Nix, supra*, at 112, 341 S.E. 2d at 118. Plaintiff entered into a legitimate agreement for the sale of stock to his son approximately one year prior to the parties separation agreement and therefore the trial court was correct in assessing the number of shares owned by plaintiff, which he had the power to transfer. The evidence presented to the trial court supports a

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**Hartman v. Hartman**

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finding that plaintiff owned 1,118 shares of stock for purposes of equitable distribution. Plaintiff merely was a conduit for his son's acquisition of the subject 684 shares of stock. The evidence and the court's findings reveal that it was never contemplated by anyone involved with the sale of the stock that plaintiff would purchase the 684 shares of stock and retain ownership thereof. There was no dissipation of marital assets as defendant contends. The trial court specifically noted that the \$7,000.00 note from R. W. Hartman, Jr., to plaintiff was a marital asset. Therefore, any marital asset funds expended by plaintiff in his role as a conduit for the sale of stock to R. W. Hartman, Jr. will be recouped.

[2] Defendant also argues that the trial court's findings, pertaining to the valuation of the stock owned by plaintiff, are not supported by the evidence. Defendant's argument on the valuation of the stock is, as discussed *supra*, erroneously premised on plaintiff being a majority shareholder of Gardens of Memory, Inc. The trial court made the following pertinent findings of fact:

Xi Mr. William Etheridge was considered by the Court to be an expert in his chosen field as a Certified Public Accountant; that furthermore, Mr. Etheridge has training and experience in valuing shares of stock in small, privately held corporations; that from the evidence of Mr. Etheridge, the court finds that the minority stock of Gardens of Memory, Inc., has a limited marketable capacity; that furthermore, due to the fact that said corporation has never been able to pay substantial dividends, the court finds from the testimony of Mr. Etheridge, that a discount factor must be applied by the Court in determining the value of the plaintiff's 1,118 shares of stock;

Xii The court finds that the value of all the shares in the corporation, if they could be sold as a whole, is \$156 per share; that this sum is determined by dividing \$401,407 (the value as determined by defendant's expert witness to be the fair market value of the corporation) by 2,568, the total number of outstanding shares of stock;

Xiii The Court finds that a discount factor of 36% must be applied to the value of stock as a whole due to the fact that the plaintiff did not have the power and ability to sell a majority interest in the corporation at the time of the separa-

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**Hartman v. Hartman**

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tion and the further fact that said plaintiff still does not have the power and ability to sell a majority interest in said corporation; that 36% of \$156 is \$56.16; that the Court further finds the value of the plaintiff's 1,118 shares of stock at the time of separation to be \$100 per share at \$118,800.

(Emphasis supplied.) Bearing in mind the principles of *Nix, supra*, and the cases cited therein, we hold that the trial court's findings are supported by competent evidence and we further hold that defendant has failed to show that the trial court's actions were "manifestly unsupported by reason, or that its ruling could not have been the result of a reasoned decision." *Nix, supra*, at 112, 341 S.E. 2d at 118.

The trial court in the capacity of trier of fact "is entitled to assess the credibility of the witnesses, and to determine the weight to be afforded their testimony." *Nix, supra*, at 115, 341 S.E. 2d at 119, *citing Mayo v. Mayo*, 73 N.C. App. 406, 410, 326 S.E. 2d 283, 286 (1985). The transcript of the proceedings is replete with testimony pertaining to the value of the subject stock. Defendant even testified that her husband had told her a year prior to their separation that the stock was worth \$100.00 per share. There were several sales of stock in Gardens of Memory, Inc. for \$40.00 per share prior to and after the parties separated. The trial court indicated in its findings and defendant testified "There had been no dividends paid since like 1977." The parties' son also testified that he was offered the opportunity to purchase stock from Harvey Huffstetler for \$30.00 per share.

The expert testimony and evidence upon which the trial court based its calculations was to the effect that the value of plaintiff's 1,118 shares of stock should be valued as those of a minority interest holder due to his inability to convey a majority of the shares of outstanding stock in Gardens of Memory, Inc.; that generally the value of stock interests representing less than control are normally discounted 30 to 50 percent; that restricted securities bear a discount rate of as much as 90 percent with a large number of stocks being discounted in the range of 50 to 70 percent. Plaintiff's expert was the only expert who testified on the process of valuing stock held in a closely held corporation. The expert explained the basis for his testimony and testified about relevant factors which may be considered in the valuation



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Hartman v. Hartman

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of stock held in a closely held corporation. Two factors which directly affect the marketability of said stock were dividend payments and liquidity of assets. There was evidence presented to the trial court that dividend payments had not been paid since 1977 and that Gardens of Memory, Inc. had experienced cash flow difficulties. In the final analysis, the expert testified that the valuation of a minority share of stock in a closely held corporation is a very subjective process. Minority shareholders lack influence to affect the liquidation to convert the underlying assets to cash. The expert testified that in his expert opinion the appropriate discount factor should be at least 50 percent. The trial court in the case *sub judice* discounted the value of the stock as a whole using the fair market value of the corporation as determined by *defendant's* expert witness. The trial court made detailed findings with respect to testimony by the parties' expert witnesses. The court considered, *inter alia*, the following in determining the value of the subject stock: (1) the selling price of the stock in 1981 and 1983; (2) the restrictions on the shares of stock as stated in the Gardens of Memory, Inc. Bylaws; (3) the minority stock of Gardens of Memory, Inc. has a limited marketable capacity; and (4) Gardens of Memory, Inc. has never been able to pay substantial dividends. For nearly four months the trial court labored on the disputed findings in this disputed order of equitable distribution. This order reflects a detailed sifting of the evidence wherein the trial court was called upon to decide the correctness of capitalization rates, an Inwood coefficient, and a franchise value. After extensive review of the record on appeal we find that there is competent evidence to support the trial court's valuation of plaintiff's stock at \$118,000.00. *Nix, supra*. We note that in April of 1981, 682 shares of stock were repurchased by the corporation, as treasury stock, at \$40.00 per share.

[3] Defendant next argues that it was error for the trial court to distribute the 1,118 shares of stock in Gardens of Memory, Inc. to plaintiff. We disagree. The trial court has broad discretion in the division of marital property. *White v. White*, 64 N.C. App. 432, 308 S.E. 2d 68 (1983), *modified and affirmed*, 312 N.C. 770, 324 S.E. 2d 829 (1985). This Court in *White, supra*, stated the following:

That our legislature intended to grant courts wide discretion in dividing marital property is indicated by (1) the language

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**Hartman v. Hartman**

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of G.S. 50-20(c); (2) the existence of the twelve enumerated factors in the statute which the court is to consider in determining what will be an equitable division; (3) the existence of the catchall factor in G.S. 50-20(c)(12) whereby the court is permitted to consider any other factor which the court finds to be just and proper; and (4) the lack of any indication as to the quantum of evidence on each of the factors required to overcome the presumption.

*Id.* at 438, 308 S.E. 2d at 72. G.S. 50-20(e) states that if impractical the trial court does not have to make a distribution of all or portions of the marital property in kind. Due to the nature of the management of a closely held corporation such as Gardens of Memory, Inc., there is no abuse of discretion by the trial court in the case *sub judice* to award all of the stock in said corporation to one of the parties. The trial court heard testimony of existing internal struggles among stockholders of Gardens of Memory, Inc. It was within the trial court's discretion to award defendant marital property to achieve an equal and equitable distribution.

Defendant next contends that the trial court failed to accomplish an equal or equitable distribution. The first argument forwarded by defendant is that the court improperly neglected to consider the relative incomes of the parties as a factor affecting the equitable distribution of marital property. We disagree.

The trial court specifically noted in its findings that it "considered all of the evidence presented by the parties pertaining to N.C.G.S. 50-20(c)(1-12) in making its determination that an *equal division* of marital properties is equitable . . ." (emphasis supplied). Findings five and six reflect the trial court's findings on the parties' income. The trial court made a determination that its findings support an equal distribution and we hold there was a rational basis therefor. *White, supra*; *Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E. 2d 33 (1985).

Defendant argues that it was inequitable for the court to distribute the note from Gardens of Memory, Inc. to her and distribute the note from Buddy Hartman, Jr. to plaintiff. We disagree. Basically, defendant attempts to reargue the validity of the sale of stock from plaintiff to Buddy Hartman, Jr. Also, defendant questions her ability to collect payment due on the \$30,000.00 note from Gardens of Memory, Inc. From our review of the record

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Hartman v. Hartman

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we cannot say that the trial court abused its discretion in distributing the \$7,000.00 and \$30,000.00 notes.

[4] Defendant's final argument with respect to the trial court's distribution of the property is that she was substantially prejudiced and that said distribution violated the statutory requirement that the distribution be equal or equitable. The items of property awarded to plaintiff were valued at \$177,332.00. The items of property awarded to defendant were valued at \$78,700.00. In order to make the distribution equitable the trial court ordered the following:

(19) As the items of property awarded to the plaintiff exceed in value the items of property awarded to the defendant by \$98,632, it is equitable that the defendant be paid a distributive award by the plaintiff in the total sum of \$49,316 as follows:

A. Plaintiff should pay the \$34,300, 14%, mortgage on the former homeplace of the parties in Walkertown, North Carolina, as said mortgage becomes due and payable; that it is recognized by the Court that, due to the age of plaintiff, the plaintiff has a limited borrowing power with lending institutions and therefore it is practical and equitable for said plaintiff to pay the \$34,300 to the defendant by making the before mentioned mortgage payments;

B. By paying to the defendant \$15,016 within 90 days of the date of the execution of this order. . . .

Defendant does not present any new contentions in support of her final challenge to the order of distribution. Our review of the order reveals an extremely complex, detailed order setting forth the trial court's rational basis for distribution of the parties' marital property and defendant has not shown any abuse of discretion by the trial court. *Nix, supra*; *White, supra*.

Defendant's final argument is that the trial court abused its discretion in denying her discovery requests. We disagree. On 24 February 1984, defendant served 50 interrogatories on plaintiff. On 4 April 1984, plaintiff objected to questions twenty-four (24) through thirty-one (31) and moved the court for a protective order. In support of his motion plaintiff averred that "it would be a violation of his duties as officer of the corporation to reveal the

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**Hartman v. Hartman**

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requested information without a directive from the stockholders and/or the Board of Directors." Plaintiff further stated that defendant works for a competitor of the corporation and that the requested information could be used in competition with Gardens of Memory, Inc. Defendant did not object to the timeliness of plaintiff's objections or motion. The trial court, without objection by defendant, in an 18 April 1984 order, directed plaintiff not to answer interrogatories twenty-four (24) through thirty-one (31), but allowed defendant to resubmit said interrogatories upon a showing by defendant that the information requested was necessary to the issues being decided. Defendant failed to show the necessity of interrogatories pertaining to Gardens of Memory, Inc.'s payroll and never resubmitted said interrogatories. Since defendant did not raise lack of timeliness for the trial court's consideration, it cannot be raised for the first time for us to consider. See *Little v. Rose*, 285 N.C. 724, 208 S.E. 2d 666 (1974). Moreover, protective orders are, pursuant to Rule 26(c), N.C. Rules Civ. P., within the trial court's discretion and will only be disturbed for an abuse of discretion. Defendant has failed to establish such an abuse of discretion. *Williams v. State Farm Mutual Automobile Insurance Co.*, 67 N.C. App. 271, 312 S.E. 2d 905 (1984).

Defendant also argues that the trial court abused its discretion by allowing plaintiff's 6 November 1984 motion for a protective order, objection to depositions, objection to interrogatories, and objection to request for production of documents. Defendant contends that "her ability to properly prepare and present her case was irreparably prejudiced by the trial court's order." The record herein does not bear out such a contention. It was within the trial court's discretion to issue a protective order upon plaintiff's motion. Plaintiff, in his motion averred, *inter alia*, that defendant was requesting additional discovery for purposes of harassment. The case was calendared for trial the week of October 15, nearly a month prior, but the entire day was spent in settlement negotiations. We find no abuse of discretion by the trial court. *Williams, supra*.

**PLAINTIFF'S CROSS-APPEAL**

[5] Plaintiff brings forward three Assignments of Error pertaining to the trial court's findings and conclusions on plaintiff and defendant's ownership interests in a house and lot located at

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**Hartman v. Hartman**

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Baden Lake, Montgomery County, North Carolina. Plaintiff contends that the trial court erred as a matter of law in making findings of fact that plaintiff and defendant had a one-half ( $\frac{1}{2}$ ) ownership interest in said property when the deed to said property contained a conveyance of a one-third ( $\frac{1}{3}$ ) ownership interest of said property to plaintiff and defendant.

This Court has stated the construction of conveyances contained in a deed as follows:

It is well settled that except in cases of fraud, mistake, or undue influence, parol trusts or agreements will not be set up or engrafted in favor of the grantor upon a written deed conveying to the grantee the absolute title, and giving clear indication on its face that such title was intended to pass. Testimony tending to show an oral agreement in direct conflict with the deed is incompetent.

*Rourk v. Brunswick County*, 46 N.C. App. 795, 796-97, 266 S.E. 2d 401, 403 (1980). The conveyance contained in the granting clause of the deed to the Baden Lake property conveyed ownership interests in the property to "Raleigh W. Hartman, Sr. & Wife, Elsie H. Hartman, Donald T. Shafer & Wife, Sue Ann Shafer, and Raleigh W. Hartman, Jr." The proposition for construing this conveyance was stated in *In Re Gardner*, 20 N.C. App. 610, 202 S.E. 2d 318 (1974), as follows:

'If an estate be given to A., B. and C., and A. and B. are husband and wife, nothing else appearing, they will take a half interest in the property and C. will take the other half.'

*Id.* at 619, 202 S.E. 2d at 324, quoting, *Davis v. Bass*, 188 N.C. 200, 205, 124 S.E. 566, 569 (1924). The trial court did not construe the subject conveyance in the manner set forth in *Gardner, supra*. The trial court considered parol evidence and found that plaintiff and defendant were one-half ( $\frac{1}{2}$ ) owners of the house and lot located at Baden Lake. There are no findings or conclusions that would under *Rourk, supra*, warrant the trial court to go outside the face of the deed to construe the subject conveyance. The conveyance was unambiguous as a matter of law. The conveyance was to one individual grantee and two sets of husbands and wives whereby each husband and wife were tenants by the entirety as to each other and tenants in common with the other grantees.

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Queensboro Steel Corp. v. East Coast Machine & Iron Works

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Thus, plaintiff and defendant were conveyed as tenants by the entirety a one-third undivided interest in the Baden Lake property. The trial court found that the fair market value of the property was \$108,000.00 and divided that amount in half for a \$54,000.00 gross value the parties owned. The trial court should have arrived at a one-third interest of \$36,000.00. Therefore, this trial court should recalculate the parties' interest in the Baden Lake property in a manner not inconsistent with this opinion and reflect that recalculation in its order of equitable distribution. In all other aspects the order stands as is.

Affirmed in part, reversed in part and remanded.

Judge WHICHARD concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. It appears to me that the court used evidence which placed a low valuation on the stock in Gardens of Memory, Inc. It then gave all the stock to the plaintiff. I do not believe we should hold this was an equitable distribution.

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QUEENSBORO STEEL CORPORATION v. EAST COAST MACHINE & IRON  
WORKS, INC. AND BRANCH BANKING AND TRUST COMPANY

No. 855SC886

(Filed 5 August 1986)

**Laborers' and Materialmen's Liens § 3— personal delivery of goods by subcontractor to site not required**

N.C.G.S. § 44A-18, which grants a lien to subcontractors "who furnished labor or materials at the site of the improvement," does not require that the subcontractor claiming the lien personally deliver the materials to the building site; rather, if a third tier subcontractor delivers materials to a second tier subcontractor with the intent that the materials ultimately be delivered at the site, and the materials are actually delivered at the site, the third tier subcontractor has a lien on the funds owed to the second tier subcontractor for those materials.

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**Queensboro Steel Corp. v. East Coast Machine & Iron Works**

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APPEAL by defendant Branch Banking and Trust Company from *Barefoot, Judge*. Judgment entered 18 March 1985 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 12 December 1985.

*Stevens, McGhee, Morgan, Lennon & O'Quinn, by Richard M. Morgan, for plaintiff appellee.*

*Ward and Smith, P.A., by Michael P. Flanagan and William F. Hill, for defendant appellant.*

BECTON, Judge.

In this action, Queensboro Steel Corporation (Queensboro) asserted a materialman's lien on funds owing from Cives Steel Company (Cives) to East Coast Machine & Iron Works, Inc. (East Coast) for steel supplied originally by Queensboro. Branch Banking and Trust Company (Branch Banking) sought to enforce a security interest in the accounts receivable of East Coast, which included the funds sought by Queensboro. The disputed funds were placed in escrow pending trial. The trial court denied a motion by Branch Banking for summary judgment and granted summary judgment in favor of Queensboro. Branch Banking appeals. We affirm.

I

The material facts are not in dispute. On 30 June 1981, East Coast executed a financing arrangement with Branch Banking. East Coast borrowed \$1,050,000 from Branch Banking and secured the loan by assigning to Branch Banking a security interest in, among other things, all accounts receivable of East Coast. Branch Banking duly perfected its security interest.

Morrison-Knudson Company was a general contractor building a tobacco facility for R.J. Reynolds Tobacco Company in Tobaccoville, North Carolina, near Winston-Salem. The general contractor hired Cives to provide reinforced steel for the project. Cives hired East Coast to provide the steel. East Coast purchased all or nearly all the steel from Queensboro. Queensboro fabricated the steel and delivered steel plate and other steel products to East Coast at its Bridgeton, North Carolina facility in late 1983 and early 1984. East Coast modified, reinforced, sandblasted and primed the steel and then delivered it to the building site in To-

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**Queensboro Steel Corp. v. East Coast Machine & Iron Works**

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baccoville. Cives owed East Coast \$154,698.35 for the modified steel, and East Coast owed \$153,277.55 to Queensboro.

East Coast is now bankrupt. Branch Banking sought to partially satisfy East Coast's debt to the bank by enforcing its security interest in East Coast's account receivable from Cives. Queensboro sought priority over the funds owing from Cives to East Coast by giving proper notice and bringing this action asserting a materialman's lien on the funds as proceeds from the steel originally supplied by Queensboro for the Tobaccoville project. After several defendants were dismissed by stipulation, Branch Banking filed an answer and counterclaim. Both Queensboro and Branch Banking moved for summary judgment. After a hearing, the trial court entered summary judgment in favor of Queensboro and denied Branch Banking's motion for summary judgment. The trial court ordered that \$152,337.19 be paid to Queensboro from the escrow fund.<sup>1</sup>

On appeal, Branch Banking contends that the trial court erred in denying its motion for summary judgment and in granting summary judgment in favor of Queensboro. We find no error and affirm the judgment below.

## II

Branch Banking argues first that summary judgment was inappropriate because there was a genuine issue of material fact whether any of Queensboro's steel was ever delivered to the building site. See Rule 56(c), North Carolina Rules of Civil Procedure; *Bone International, Inc. v. Brooks*, 304 N.C. 371, 283 S.E. 2d 518 (1981). This argument is without merit. In March 1984, Branch Banking stipulated that Queensboro's steel products were delivered to and used in the Tobaccoville facility. Moreover, nothing presented to the trial court contradicts the evidence that Queensboro's steel was delivered to East Coast by Queensboro, delivered to the building site by East Coast, and actually used in the improvement.

The main issue before us is whether N.C. Gen. Stat. Sec. 44A-18 (1984), which grants a lien to subcontractors "who fur-

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1. The parties stipulated that \$153,277.55 was owing to Queensboro. Nonetheless, because neither party contests the amount in the order, we let it stand.



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**Queensboro Steel Corp. v. East Coast Machine & Iron Works**

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nished labor or materials at the site of the improvement," requires that the subcontractor claiming the lien personally deliver the materials to the building site. We hold that it does not.

A

Morrison-Knudson Company was the general contractor, contracting with the owner to improve real property in Tobaccoville. Cives, East Coast and Queensboro were first, second and third tier subcontractors, respectively, contracting to improve the same real property. See N.C. Gen. Stat. Sec. 44A-17 (1984). Queensboro does not base its claim on subrogation. Rather, it claims a lien against funds owed to East Coast, the party with whom it dealt. General Statute Section 44A-18 provides in part:

(3) A third tier subcontractor who furnished labor or materials at the site of the improvement shall be entitled to a lien upon funds which are owed to the second tier subcontractor with whom the third tier subcontractor dealt and which arise out of the improvement on which the third tier subcontractor worked or furnished materials.

. . . .

(5) The liens granted under this section shall secure amounts earned by the lien claimant as a result of his having furnished labor or materials at the site of the improvement under the contract to improve real property, whether or not such amounts are due and whether or not performance or delivery is complete.

Branch Banking argues that these subsections unambiguously require that the lien claimant personally deliver the materials at the site. We disagree.

Generally, words in a statute that have not acquired a technical meaning must be given their "natural, approved, and recognized meaning." *Black v. Littlejohn*, 312 N.C. 626, 638, 325 S.E. 2d 469, 478 (1985) (citation omitted); see *Parnell-Martin Supply Company v. High Point Motor Lodge, Inc.*, 277 N.C. 312, 319, 177 S.E. 2d 392, 396 (1970). In determining whether statutory language is ambiguous, and therefore subject to judicial determination of legislative intent, courts may consult a dictionary. *Black*. In a legal context, "furnish" means "[t]o supply, provide, or equip, for

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Queensboro Steel Corp. v. East Coast Machine & Iron Works

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accomplishment of a particular purpose." Black's Law Dictionary 608 (5th ed. 1979); see Webster's Third New International Dictionary, Unabridged 923-24 (1968) (" . . . to provide or supply with what is needed, useful, or desirable. . . .").

It is not clear that the legislature, by requiring that materials be provided or supplied at the site by the lien claimant, intended to require *personal delivery* by the lien claimant. Another reasonable interpretation is that, while the lien claimant must provide the materials for the improvement of the real property with the intent that they ultimately arrive at the site, actual delivery of the materials on the premises may be made by anyone. We conclude that this statutory language is ambiguous.

The term "furnish" is used in almost every state's mechanics' lien statute. Annot., 32 A.L.R. 4th 1130, 1135 (1984). It is a "key concept," sometimes treated as equivalent to delivery of the materials to the site, and sometimes "imposing a less stringent requirement." *Id.* We must consider whether, in G.S. Sec. 44A-18, "furnished . . . at the site" simply requires a delivery of the materials to the building site, or whether it also requires *personal delivery by the lien claimant*.

Although some states follow the rule that provisions in mechanics' lien statutes giving rise to a lien are strictly construed while remedial provisions are liberally construed, *see generally* 53 Am. Jur. 2d *Mechanics' Liens* Secs. 23-24, at 538-43 (1970), we follow the example set in *Raleigh Paint and Wallpaper Company v. Peacock & Associates, Inc.*, 38 N.C. App. 144, 247 S.E. 2d 728 (1978), *disc. rev. denied*, 296 N.C. 415, 251 S.E. 2d 470 (1979), and proceed to determine the intention of the legislature. *See Ross Realty Company v. First Citizens Bank & Trust Company*, 296 N.C. 366, 250 S.E. 2d 271 (1979); *Parnell-Martin Supply Company*.

B

In *Raleigh Paint*, this Court considered whether a lien claimant who contracted directly with an owner to furnish materials to improve real property must personally deliver the materials at the site of the improvement:

There is no question but that the material was delivered by someone and that it was used in the construction. The material issue of fact asserted to exist by the defendants con-

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Queensboro Steel Corp. v. East Coast Machine & Iron Works

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cerns whether the materials supplied by the plaintiff were delivered to the site of the construction by plaintiff or his agent. The materiality of this fact question depends upon whether the statute requires actual delivery to the site by the lien claimant.

38 N.C. App. at 146, 247 S.E. 2d at 730.

Three of the statutes involved in *Raleigh Paint* used language identical to the language under consideration in the case at bar. The Court in *Raleigh Paint* emphasized this language.

"Sec. 44A-8. . . . Any person who . . . furnishes materials pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a lien on such real property to secure payment of all debts owing for . . . *material furnished* pursuant to such contract." (Emphasis added.)

"Sec. 44A-10. . . . Liens granted by this Article shall relate to and take effect from the time of the first furnishing of labor or materials *at the site of the improvement by the person claiming the lien.*" (Emphasis added.)

"Sec. 44A-12. . . . (b) . . . Claims of lien may be filed at any time after the maturity of the obligation secured thereby but not later than 120 days after the last furnishing of labor or materials *at the site of the improvement by the person claiming the lien.*" (Emphasis added.)

"Sec. 44A-13. . . . (a) An action to enforce the lien created by this Article may be instituted in any county in which the lien is filed. No such action may be commenced later than 180 days after the last furnishing of labor or materials *at the site of the improvement by the person claiming the lien.*" (Emphasis added.)

38 N.C. App. at 147, 247 S.E. 2d at 731. This Court rejected the argument, raised by the defendant in *Raleigh Paint* and suggested by legal commentators, that this language "should be read as meaning 'material *delivered* at the site of the improvement by the person claiming the lien.'" *Id.* (emphasis added); see, e.g., Urban & Miles, *Mechanics' Liens for the Improvement of Real*

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Queensboro Steel Corp. v. East Coast Machine & Iron Works

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*Property: Recent Developments in Perfection, Enforcement, and Priority*, 12 Wake Forest L. Rev. 283, 293-94 (1976). This Court concluded:

Although this interpretation could fit consistently into the statutory language, it imposes an additional burden on the lien claimant that is unwarranted, considering the language, policy, and scheme of the statute.

38 N.C. App. at 147, 247 S.E. 2d at 731.

We reaffirm the interpretation and decision in *Raleigh Paint* and apply its reasoning in the case at bar. See generally *id.* at 148-49, 247 S.E. 2d at 731-32.

Branch Banking argues that *Raleigh Paint* is distinguishable because G.S. Sec. 44A-8 (granting liens to contractors) does not contain the explicit language found in G.S. Sec. 44A-18 (granting liens to subcontractors) requiring materials to be furnished *at the site* by the lien claimant. This is a distinction without a difference. The lien granted in G.S. Sec. 44A-8 could only be enforced through G.S. Secs. 44A-10, -12, and -13, which all include the language, "at the site of the improvement by the person claiming the lien."

The language "at the site" was included to assure fair notice, actual or constructive, of materialmen's liens to interested parties by requiring visible placement of the materials at the site.<sup>2</sup>

The requirement of visibly placing materials on the site of the improvement does not of necessity impose the further requirement that the lien claimant himself actually deliver the materials to the site. Such a requirement would not serve to further the requirement of notice to third parties. Consequently, other courts have properly refused to impose such a

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2. Our case is not analogous to the case of a locksmith who provides locks that are incorporated into doors off the site of the improvement. It is arguable that when the doors are delivered to the site, there would be no effective notice to third parties of a lien on the locks, as opposed to a lien on the doors as whole units. Our case is like that of a wood supplier whose product is sanded and finished off the site and then delivered. We believe third parties would realize that there is a wood supplier who may claim a lien if not paid. We express no opinion on the rights of a supplier who furnishes an item that is incorporated off the site into a larger unit which is then delivered at the site.

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Queensboro Steel Corp. v. East Coast Machine & Iron Works

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requirement on the lien claimant. *Delivery to a place other than the site of the improvement, if made with the intent that materials will be later placed on the site, and if they are so placed, will support a lien.*

*Raleigh Paint*, 38 N.C. App. at 148-49, 247 S.E. 2d at 732 (citations omitted and emphasis added). Subcontractors often supply materials off the site to other subcontractors or to the general contractor; some of these materials may be used entirely off the site of the improvement to fabricate other materials and may never be delivered at the site. We believe that the language specifying that a *subcontractor* must furnish the materials at the site was intended to assure that only those materials provided specifically for use in the improvement of the real property would give rise to a lien.

## C

Although specific statutory rules vary widely among the states, there are two general doctrines that give structure to the analysis of mechanics' and materialmen's lien statutes. See generally 53 Am. Jur. 2d *Mechanics' Liens* Secs. 93-95, at 603-09; Annot., 32 A.L.R. 4th 1130, 1134-35 (1984); Urban & Miles, *supra*, at 303-04. The first doctrine requires actual incorporation of the materials into the real estate improvement in order to entitle the supplier to a lien. Because actual incorporation is often difficult to prove, most states using this doctrine treat proof of delivery at the site of the improvement as *prima facie* evidence of actual incorporation or as evidence sufficient to raise a presumption of incorporation. See, e.g., *Southern Sash of Huntsville, Inc. v. Jean*, 285 Ala. 705, 235 So. 2d 842 (1970); *Bankston v. Smith*, 236 Ga. 92, 222 S.E. 2d 375 (1976); *District Heights Apartments, Inc. v. Noland Company*, 202 Md. 43, 95 A. 2d 90 (1953); Fla. Stat. Ann. Sec. 713.01(6) (1969); Tenn. Code Ann. Sec. 66-11-101(5) (1982).

Most states have adopted the second approach, sometimes in addition to the incorporation method of establishing a lien. The second approach recognizes a lien, even if there has been no actual incorporation, upon proof that (1) the claimant specially fabricated or provided the materials for use in the improvement, and (2) there was actual delivery at the site. See, e.g., *Crane Company v. Naylor*, 70 Okla. 75, 172 P. 956 (1918); *Hyak Lumber & Millwork, Inc. v. Cissell*, 40 Wash. 2d 484, 244 P. 2d 253 (1952);

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Queensboro Steel Corp. v. East Coast Machine & Iron Works

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Tenn. Code Ann. Sec. 66-11-101(5), (10), -102(a) (1982 & 1985 Supp.). See generally 53 Am. Jur. 2d *Mechanics' Liens* Sec. 95, at 607.

In the states requiring actual delivery as an element of the lien claim, whether they require proof of incorporation or not, there appears to be no requirement of personal delivery by the lien claimant of the materials at the site of the improvement. See, e.g., *Smalley v. Gearing*, 121 Mich. 190, 203, 79 N.W. 1114, 1120 (1899) (Stone delivered off the site by claimant; later delivered at site); *Bruce v. Berg*, 8 Mo. App. 204, 207 (1879); *Rogers v. Crane Company*, 180 Okla. 139, 68 P. 2d 520 (1937); *Peerless Pacific Company v. Rogers*, 81 Or. 51, 158 P. 271 (1916) (actual use required, but personal delivery by claimant not required); *Dealers Supply Company v. First Christian Church*, 38 Tenn. App. 568, 276 S.W. 2d 769, 773 (1954) (if provided for use in, and actually used in, improvement, "it is of no consequence that the materialman did not himself deliver the materials at the site of the improvement."); *Hyak Lumber*, 40 Wash. 2d at 485, 244 P. 2d at 254 ("Who, or what agency, performed the physical act of delivery is immaterial." (citation omitted)); *Builder's Lumber Company v. Stuart*, 6 Wis. 2d 356, 94 N.W. 2d 630 (1959); Fla. Stat. Ann. Sec. 713.01(11) (1986 Supp.), (13) (1969); Ga. Code Ann. 44-14-361(a)(2) (1985 Cum. Supp.) (allows a subcontractor or materialman to deliver to another subcontractor); Ohio Rev. Code Ann. Sec. 1311.02 (1979) (allows delivery to any subcontractor); Tenn. Code Ann. Sec. 66-11-101(5), (10); see also *Southern Sash of Huntsville, Inc.*

In contrast to the state rules discussed in Annot., 32 A.L.R. 4th 1130, 1164-68, Secs. 11-13 (1984) and Annot., 39 A.L.R. 2d 394, 435-49, Secs. 11-16 (1955), North Carolina's current mechanics' and materialmen's lien statutes apparently do not require actual incorporation of materials into the improvement, even when the materials are furnished to a subcontractor. See Urban & Miles, *supra*, at 303-04, 354-55. But see *Fulp & Linville v. Kernersville Light and Power Company*, 157 N.C. 154, 72 S.E. 869 (1911) (interpreting an older statute that has since been repealed). In some states, proof of actual use is required when the materials are delivered to a contractor or subcontractor rather than directly to the owner. This protects the owner against liens based on materials that are never actually delivered and of which the owner has no notice. This function is served in our State, at least in part, by the requirement that the materials be delivered at the site, whether by the lien claimant or by another party.

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**Queensboro Steel Corp. v. East Coast Machine & Iron Works**

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In 1971, the legislature enacted G.S. Sec. 44A-18 and other provisions within Chapter 44A relating to the liens of subcontractors who do not deal directly with owners. *See* 1971 N.C. Sess. Laws, ch. 880, s. 1. The amendments were designed to "clarify existing law relative to the lien of subcontractors for the improvement of real estate and to provide an efficient procedure for the enforcement of the lien in accordance with modern business practice." Drafting Committee on Lien Laws, of the General Statutes Commission, Memorandum in Explanation and Support of House Bill 393 and Senate Bill 243, at 1 (1971). The legislative history of the amendments indicates that the drafters addressed several important issues. For example, they addressed whether (and to what extent) subcontractors' liens would be against funds owed to parties with whom they dealt, rather than against real property itself, and whether subcontractors more remote than the third tier should have rights of subrogation to contractors' liens against owners' land. *Id.* at 8-9. Given this background and the detailed explanation of the intended changes by the North Carolina drafting committee, the absence of any discussion of a requirement of personal delivery by a subcontractor strongly suggests that the legislature did not intend to add this unusual and burdensome requirement when it enacted G.S. Sec. 44A-18.

In *Raleigh Paint* we held there was no requirement of personal delivery under G.S. Sec. 44A-8. We now hold there is no such requirement under G.S. Sec. 44A-18. If a third tier subcontractor delivers materials to a second tier subcontractor with the intent that the materials ultimately be delivered at the site, and the materials are actually delivered at the site, the third tier subcontractor has a lien on the funds owed to the second tier subcontractor for those materials.

### III

Because personal delivery at the building site by Queensboro was not required, there were no issues of material fact before the trial court. The steel provided by Queensboro was specially fabricated with the intent that it be delivered at the building site, and it was so delivered. Queensboro established a valid lien under Chapter 44A on the funds owed to East Coast. This lien takes priority over Branch Banking's security interest in the same funds. N.C. Gen. Stat. Sec. 44A-22 (1984).

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Clark v. American & Efird Mills

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For the reasons set forth above, summary judgment in favor of plaintiff Queensboro is

Affirmed.

Judges WHICHARD and PARKER concur.

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ETHEL K. CLARK, EMPLOYEE, PLAINTIFF v. AMERICAN & EFIRD MILLS,  
EMPLOYER, AND AETNA LIFE AND CASUALTY INSURANCE COMPANY,  
CARRIER, DEFENDANTS

No. 8610IC22

(Filed 5 August 1986)

**Master and Servant § 68— workers' compensation—byssinosis—denial of compensation—sufficiency of evidence**

Though the evidence in a workers' compensation proceeding would have supported a finding that plaintiff suffered from byssinosis, it was also sufficient to support the Industrial Commission's finding that she suffered from bronchitis which was the result of an earlier bout with pneumonia, and such findings were sufficient to support its denial of compensation.

APPEAL by plaintiff from the North Carolina Industrial Commission opinion and award filed 31 July 1985. Heard in the Court of Appeals 8 May 1986.

This case was previously before the Court of Appeals. Plaintiff filed her initial claim on 8 June 1978, alleging occupational lung disease following her employment of thirty-three (33) years in the cotton textile industry. In an opinion and award filed 27 January 1982, plaintiff's claim was denied. On 9 August 1982, that decision was affirmed in an opinion of the Full Commission. In an opinion filed 21 February 1984 (*Clark v. American & Efird Mills*, 66 N.C. App. 624, 311 S.E. 2d 624 (1984)), this Court reversed the order and remanded the cause for further consideration in light of the decision of *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E. 2d 359 (1983). On 8 January 1985, the decision of this Court was affirmed *per curiam* by the North Carolina Supreme Court. (*Clark v. American & Efird Mills*, 312 N.C. 616, 323 S.E. 2d 920 (1985).) On 11 February 1985, a Petition for Rehearing (8210IC1283) was filed with the Supreme Court. On 25 February 1985, the Full



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Clark v. American & Efird Mills

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Commission entered an order by Commissioner Clay which determined that plaintiff had an occupational disease and awarded her compensation. On 7 March 1985, Commissioner Clay ordered that the 25 February 1985 order be held in abeyance pending the North Carolina Supreme Court's action on the petition for rehearing. On 8 March 1985, defendants gave notice of appeal to this Court. On 2 April 1985, the North Carolina Supreme Court, in conference, denied defendants' petition for rehearing. On 6 May 1985, all parties stipulated that defendants take a voluntary dismissal of their appeal and that the matter would be reheard before the Full Commission. The matter was argued on 26 June 1985. After considering the arguments of counsel, the Full Commission filed an order by Commissioner Stephenson, denying compensation, with Commissioner Brooks concurring and Commissioner Clay dissenting. It is from this opinion that plaintiff presently appeals.

*Charles R. Hassell, Jr., for plaintiff appellant.*

*Hedrick, Eatman, Gardner & Kincheloe, by Hatcher Kincheloe, for defendant appellees.*

JOHNSON, Judge.

Plaintiff Ethel K. Clark worked for employer defendant American & Efird Mills for thirty-three (33) years, from 1943 until 1976. It is the only employment she has ever had. The facts pertinent to this appeal are contained in the following summary of the Commission's factual findings to which no exceptions have been taken: Plaintiff Mrs. Clark was born 26 February 1914 and has an eighth grade education. Plaintiff worked for defendant employer from 1943 until 26 February 1976. Throughout her employment she worked in the winding room where cotton was processed, "generating visible dust in the work environment throughout her work career." From 1943 until 1969 plaintiff had no respiratory illnesses requiring medical attention. In late 1968 or early 1969 plaintiff developed a cough and/or smothering in her chest which led her to consult Dr. Thomas Kelly on 7 January 1969. Dr. Kelly diagnosed Mrs. Clark as having pneumonia. He treated her for the next six months, initially for pneumonitis with a bad cough. After the pneumonitis cleared, plaintiff's cough continued. Thereafter, plaintiff developed a cold on top of the residual cough which

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Clark v. American & Efird Mills

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required hospitalization in June of 1969. "Dr. Kelly's observation of plaintiff's cough from January to June of 1969 . . . was that it was one of the worst coughs he had ever seen." Plaintiff did not work from January through June, 1969. During that time "plaintiff's pulmonary problems increased" to the point that she suffered "a significant and continuous chronic bronchitis during this period." Plaintiff continued to cough after returning to work, sometimes requiring her to leave her job for a short period, occasionally causing her to gag and become nauseated. Nonetheless, plaintiff continued in the same position until 1976 with no substantial absences. "Since the development of plaintiff's problems in 1969, the exposure to dust and lint in any place makes her cough." Since 1969 "continuing to the present, the primary feature of plaintiff's lung disease has been a persistent, productive cough."

The findings do not show, although there is evidence to show, that plaintiff has never smoked tobacco products. Plaintiff excepted to the following findings and conclusions of law:

8. After returning to work plaintiff's symptoms remained the same all the way from 1969, when her bronchitis began, through the end of her employment.

9. Beginning in 1969, when she was out for about six months, continuing through the time that she retired and continuing from that time through the time of her hearing in this case, plaintiff's symptoms have been mostly the same. Some days they are worse than others but overall the symptoms have remained constant.

10. Plaintiff worked until February 26, 1976. On that date she became 62 years of age and eligible for Social Security. It was for this reason she retired.

14. Plaintiff suffers from chronic bronchitis. This disease manifests itself as a cough with sputum production for at least 90 days out of the year for two successive years or more. Chronic bronchitis can develop from cotton dust exposure, or as a result of serious respiratory illness, pneumonia, or from a variety of factors, and many times the cause of the disease is unknown and cannot be explained.

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**Clark v. American & Efird Mills**

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15. Plaintiff's chronic bronchitis was caused by the serious respiratory illness and pneumonia that she had in 1969. This is a common occurrence in many individuals. Pneumonia generally is the result of infection. It is not the result of exposure to dust in the cotton textile environment. Plaintiff's chronic bronchitis was not caused, did not have its origin in, and was not contributed to by the textile mill environment. It developed while plaintiff was out of work in early 1969. Once plaintiff's chronic bronchitis developed, exposure to dust in the mill environment increased plaintiff's symptoms. This mill environment, however, did not aggravate or accelerate the development of the bronchitis. Increased cough caused increasing discomfort, but, in plaintiff's case, did not make her basic disease any worse. Once the bronchitis developed while plaintiff was out of work in 1969, her condition remained the same to the time of the hearing.

16. . . . She has no permanent respiratory impairment. . . . On the basis of examinations by Dr. Kelling and Dr. Harris, plaintiff has no restrictions on activity, other than to avoid airway irritants of any type.

17. Plaintiff's employment did not significantly contribute to the development of her respiratory problems and she has sustained no disease which is characteristic of or peculiar to her occupation.

\* \* \*

The above findings of fact engender the following

CONCLUSIONS OF LAW

1. The etiology of plaintiff's chronic bronchitis was the pneumonia and respiratory illness she suffered in 1969. The work she was doing in the cotton textile industry was not a significant causal factor in the development of her chronic bronchitis.

2. Subsequent to the development of chronic bronchitis, plaintiff suffered increased symptoms on exposure to dust of any type. These symptoms were transit [sic], much like the symptoms a person with asthma would have on exposure to ragweed. Those symptoms did not produce any additional

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**Clark v. American & Efird Mills**

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permanent respiratory impairment and such symptoms were not a significant contributing factor to the development of her chronic bronchitis.

2. [sic] Plaintiff's present lung disease was not due, either wholly or in part, to causes and conditions characteristic of and peculiar to the cotton textile environment. Plaintiff does not have an occupational disease. Her respiratory condition was not significantly contributed to in its development (either causally or by aggravation) by exposure to cotton dust in the mill environment.

In plaintiff's first Assignment of Error plaintiff contends there is no competent evidence to support those of the Commission's findings and conclusions stating plaintiff's pulmonary disorder was not significantly caused or aggravated by her exposure to cotton dust in her work place.

We have thoroughly reviewed the record in the case before us. There is substantial evidence in favor of compensation for this woman who worked the majority of her adult life, thirty-three years, for only defendant employer, in a work place she described as so full of cotton dust that "it was just like it was a snowing in there all the time." Nonetheless, we are compelled to affirm the order of the Full Commission denying compensation.

The Industrial Commission is the fact finding body and it is a well settled rule that the findings of fact made by the Commission are conclusive on appeal, if supported by competent evidence. *Hansel v. Sherman Textiles*, 304 N.C. 44, 49, 283 S.E. 2d 101, 104 (1981); *Inscoe v. DeRose Industries, Inc.*, 292 N.C. 210, 215, 232 S.E. 2d 449, 452 (1977); *Vause v. Vause Farm Equipment Co.*, 233 N.C. 88, 93, 63 S.E. 2d 173, 177 (1951). "It is not the role of the Court of Appeals or of [the Supreme Court] to substitute its judgment for that of the finder of fact." *Hansel, supra*, at 50, 283 S.E. 2d at 105. The reviewing court is limited in its inquiry to two questions of law, namely (1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the findings of fact justify the Commission's legal conclusions and decision. *Inscoe, supra*, at 216, 232 S.E. 2d at 452.

It is apparent upon review of the evidence in the record that there is strong and convincing evidence that plaintiff has bysino-

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Clark v. American & Efird Mills

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sis or that plaintiff has chronic bronchitis as a result, in whole or in part, of her long exposure to cotton dust. Either finding could more easily be a reasonable interpretation of the evidence than the finding that she had chronic bronchitis caused by pneumonia, a non-work-related cause. However, "[i]t is the duty of the appellate court to determine whether, in any reasonable view of the evidence before the Commission, it is sufficient to support the critical findings necessary for a compensation award [or denial thereof]." *Inscocoe, supra*, at 217, 232 S.E. 2d at 453 (citing *Keller v. Electric Wiring Co.*, 259 N.C. 222, 130 S.E. 2d 342 (1963)).

The record includes the testimony of three medical doctors. We find competent evidence to support all the essential findings of the Commission. We shall now focus on the evidence presented regarding the critical issue of causation.

T. Reginald Harris, M.D., a member of the Industrial Commission's panel on pulmonary diseases, was selected by defendant to examine plaintiff. In his expert opinion, plaintiff had chronic bronchitis which was caused by her previous illness of pneumonia. In his deposition, Dr. Harris stated, "But, based on the fact that she had relatively little in the way of problems prior to that illness [pneumonia], it was a severe and significant illness and she, thereafter, had problems that are typical chronic bronchitis . . . I feel that the pneumonia incident was probably significant in her future development of chronic bronchitis." Later, on cross-examination, he stated, "[i]n this particular lady, I felt like her chronic bronchitis was due to causes other than her cotton dust exposure." Also, he related that "[Mrs. Clark] thought that she would improve when she quit work in 1976 and believes that her breathing and cough may be slightly better but still has most of the same symptoms."

Plaintiff rests much of her argument for causation on what she maintains is the medical definition of chronic bronchitis. She asserts that all medical testimony showed that chronic bronchitis is defined to be a persistent cough and sputum production for two years or longer. Because the disease is the productive cough, she opines, if the cough increases due to exposure to cotton dust, it necessarily follows that the disease has been aggravated by the cotton dust. Plaintiff further maintains that the testimony of Dr. Harris, to wit: that plaintiff's increased coughing in the presence

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Clark v. American & Efird Mills

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of cotton dust did not worsen her "basic" disease (Finding of Fact 15), is, internally inconsistent and therefore renders his testimony incompetent. We decline to accept plaintiff's syllogism. There is ample medical evidence in the record to show that the cough is not *equivalent* to the disease, but is "*manifested* by cough and sputum production" (emphasis added), that the cough and sputum production "are significant factors in the diagnosis of chronic bronchitis." As one specific example, in the written medical report, submitted by Dr. Harris and admitted into evidence, is the statement, "This patient has typical chronic bronchitis as manifested by sputum and cough." We conclude that Dr. Harris' testimony is not incompetent for reason of inconsistency. Accordingly, Finding of Fact 14 and Finding of Fact 15 are supported by the evidence. Moreover, we hold that all the findings are supported by the evidence with the exception of Finding of Fact 10 regarding plaintiff's reason for retiring and portions of Finding of Fact 16. However, we find these errors constitute only harmless errors. We hold that the remaining findings support the conclusions, which, in turn, support the Commission's denial of benefits. Plaintiff's first Assignment of Error is overruled.

In plaintiff's last Assignment of Error, plaintiff contends that the Industrial Commission abused its discretion as follows: (1) by failing to follow the mandate of the appellate courts; (2) by failing to consider appellant's evidence, and (3) by denying the award upon rehearing after initially awarding compensation. We do not agree. We shall address each contention in turn.

When this case was first before this Court to review the order of the Full Commission denying compensation, the order was reversed and the cause remanded. This Court, in an opinion by Judge Eagles, with Judge Webb dissenting, acknowledged that plaintiff had established that she had chronic obstructive pulmonary disease with chronic bronchitis as the only element thereof and that "[b]y the effects that it has on a person, chronic bronchitis, which is not necessarily a work-related disease, is indistinguishable from byssinosis, which is peculiarly if not exclusively related to the work environment in textile mills." *Clark v. American & Efird Mills*, 66 N.C. App. 624, 627, 311 S.E. 2d 624, 626 (1984). This Court remanded the cause to the Industrial Commission for findings on the question of "significant contribution," a test for causation established in the then recent case of *Rutledge*

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Clark v. American & Efird Mills

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*v. Tultex Corp.*, 308 N.C. 85, 301 S.E. 2d 359 (1983). Specifically, this Court outlined three factors from *Rutledge, supra*, and *Swink v. Cone Mills*, 65 N.C. App. 397, 309 S.E. 2d 271 (1983), to be considered in determining whether plaintiff's chronic bronchitis was work-related. *Clark, supra*, at 628, 311 S.E. 2d at 627. They are: (1) the extent of the worker's exposure to cotton dust, (2) the extent of other non-work-related, but contributory exposures and components and (3) the manner in which the disease developed with reference to the claimant's work history. *Id.* In a decision *per curiam*, our Supreme Court affirmed and reiterated:

The Industrial Commission is to determine on remand whether claimant has an occupational disease and whether claimant is disabled as a result thereof in light of the factors enumerated in this Court's opinion in *Rutledge v. Tultex Corporation*, 308 N.C. 85, 301 S.E. 2d 359 (1983).

*Clark v. American & Efird Mills*, 312 N.C. 616, 616, 323 S.E. 2d 920, 920 (1985).

The opinion of the Full Commission presently before us indicates that the Commission did consider these factors in determining whether plaintiff's chronic bronchitis was work-related. Findings of Fact 15 and 17 address the question of "significant contribution." Finding of Fact 15 addresses what the Commission regards as the non-work-related component of her disease. The findings as a whole relate the manner in which plaintiff's chronic bronchitis developed relative to her work history.

It is not error, as plaintiff contends, that the Commission omitted a finding that Mrs. Clark has never smoked tobacco products. *Rutledge, supra*, requires findings regarding only what the Commission deems to be *contributory* exposures and components. *Rutledge* does not require a finding regarding what does not contribute to a claimant's disease. The Commission substantially complied with the orders of the appellate courts.

Plaintiff's two final contentions are without merit. There is no indication in the opinion at issue that the Commission failed to *consider* plaintiff's evidence. The testimonies of the two pulmonary specialists were at odds on the issue of the work-relatedness of Mrs. Clark's disease. As stated previously, the Commission is the fact finder and it cannot be deemed an abuse of discretion

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**Masciulli v. Tucker**

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that it found facts supporting a denial of compensation. Neither can it be deemed an abuse of discretion by the Commission to award compensation and, upon rehearing, to deny compensation. Defendants gave notice of appeal to the award of compensation. Plaintiff stipulated to a rehearing before the Full Commission and a voluntary dismissal of the pending appeal with full knowledge that the Commission was not compelled to rule in her favor upon rehearing.

The 31 July 1985 opinion of the Full Commission denying compensation is

Affirmed.

Judges WEBB and WHICHARD concur.

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GWENDOLYN R. MASCIULLI, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR  
TARA MASCIULLI, A MINOR v. CHARLES ALBERT TUCKER AND TERRI  
LIN KLECKNER

No. 8510SC1308

(Filed 5 August 1986)

**1. Automobiles and Other Vehicles § 90.9— duty to maintain proper lookout—refusal to instruct error**

In an action to recover for personal injuries sustained by plaintiff in an automobile accident, the trial court erred in refusing to instruct on defendant's duty to maintain a proper lookout where the evidence tended to show that defendant was operating a motor vehicle in the rain on wet pavement; she was able to discern that she was approaching an automobile in her lane of travel; she saw the brake lights but mistook them for taillights and assumed that the automobile was moving; the driver of the stopped automobile had his left turn signal on; and once defendant realized that the vehicle was stopped, she slammed on her brakes too late to avoid a rear end collision.

**2. Automobiles and Other Vehicles § 90.9— failure to maintain proper control of vehicle—refusal to instruct error**

In an action to recover for personal injuries sustained by plaintiff in an automobile accident, the trial court erred in refusing to instruct on defendant's failure to maintain proper control of her automobile where the evidence tended to show that defendant, while operating an automobile under hazardous conditions, perceived an automobile in her lane of travel, but despite her "slamming" on the brakes she was unable to maintain control of her automobile and slid into the rear end of the automobile in front of her.



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**Masciulli v. Tucker**

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**3. Automobiles and Other Vehicles § 90.7— sudden emergency—instruction not supported by evidence**

In an action to recover for personal injuries sustained by plaintiff in an automobile accident, the trial court erred in instructing the jury on the applicability of the doctrine of sudden emergency where the evidence tended to show that defendant was driving in the rain on wet pavement; there was no evidence about a sudden downpour or sudden change of driving conditions; the evidence tended to show that defendant was driving at an excessive rate of speed for the existing conditions; and any alleged emergency was not sudden and was caused in material part by defendant's disregard of the existing conditions and mistaken assumption that the automobile which she hit was moving.

APPEAL by plaintiff from *Bailey, Judge*. Judgment entered 10 July 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 6 May 1986.

This is a civil action instituted by Gwendolyn R. Masciulli in her individual capacity and as guardian ad litem for Tara Masciulli, a minor, seeking damages in her individual capacity and damages for personal injuries Tara sustained in a two car automobile collision allegedly caused by the negligence of defendant Kleckner. In her complaint, plaintiff alleged, *inter alia*, that on 10 January 1984, defendant Terri Lin Kleckner, while operating defendant Charles A. Tucker's automobile, was grossly negligent by (1) operating the motor vehicle at an excessive rate of speed under the existing conditions, (2) following too closely, and (3) failing to keep a proper lookout and to keep the motor vehicle under proper control. Plaintiff further averred that defendant Kleckner operated the motor vehicle with defendant Tucker's permission; drove the motor vehicle into the rear end of the motor vehicle plaintiff Tara was a passenger in, resulting in plaintiff Tara sustaining serious bodily injuries. Plaintiff Tara sought \$50,000.00 as compensatory damages and \$10,000.00 punitive damages. Defendant answered plaintiff's complaint denying all pertinent allegations of negligence and averred that defendant Kleckner's response to a sudden emergency not of her own creation was reasonable under the circumstances and moved the court for a dismissal pursuant to Rule 12(b)(6), N.C. Rules Civ. P. When the case came on for jury trial 8 July 1985, the trial court dismissed plaintiffs' claim for punitive damages.

Evidence adduced at trial tended to show the following:

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**Masciulli v. Tucker**

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On 10 January 1984 around 5:15 p.m., plaintiff Tara, a minor, was a passenger in the rear seat of a motor vehicle owned and operated by Randolph Fryar. The vehicle was traveling in a southerly direction on North Hills Drive in Raleigh, North Carolina. At the time the posted speed limit on this street was thirty-five (35) miles per hour. The then existing conditions were raining and the pavement was wet. The weather conditions were such that Fryar had his headlights turned on. Fryar brought his automobile to a stop in the southbound traveling lane atop the crest of a small hill in order to allow oncoming northbound traffic to pass so that he could execute a left turn into the entrance of the Knolls Apartment complex where Tara lived. The road character at this area is a straight two lane roadway, one lane for northbound traffic and the other for southbound traffic. While stopped and waiting to turn left, Fryar had his mechanical left turn signal activated signaling his intent to turn. Defendant Kleckner was also operating a motor vehicle in a southerly direction on North Hills Drive. She was operating defendant Tucker's 1980 Fiat automobile with Tucker's permission. Defendant Kleckner saw the brake lights of Fryar's automobile but assumed they were taillights. Kleckner did not apply her brakes in time to prevent a rear end collision with Fryar's automobile in which plaintiff Tara was a passenger in the rear seat. Raleigh Police Officer Jiles Clark Smith reported to the scene of the accident and investigated the accident. Officer Smith issued defendant a citation for traveling at an excessive rate of speed.

At the close of all the evidence, the trial court denied plaintiffs request for jury instructions embodying the law pertaining to reasonable lookout and proper control and instructed the jury, *inter alia*, on the doctrine of sudden emergency. In response to the first issue, "Was the plaintiff [Tara] injured and damaged by the negligence of the defendant [Kleckner]?", the jury answered, "No [sic] Sudden Peril." Judgment was entered against plaintiffs. Plaintiffs appeal.

*Currie, Pugh & Davis, by E. Yvonne Pugh, for plaintiff appellant.*

*Bailey, Dixon, Wooten, McDonald, Fountain & Walker, by Gary S. Parsons, for defendant appellees.*

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Masciulli v. Tucker

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JOHNSON, Judge.

[1] Plaintiff assigns error to the trial court's refusal to instruct the jury on the law pertaining to evidence offered by plaintiff on defendant's failure to keep a proper lookout and to keep the automobile under proper control. Plaintiff, in her brief, correctly cites *Beanblossom v. Thomas*, 266 N.C. 181, 146 S.E. 2d 36 (1966), for the following principle:

Unless the driver of the leading vehicle is himself guilty of negligence, or unless an emergency is created by some third person or other highway hazard; *the mere fact of a collision with the vehicle ahead furnishes some evidence* that the motorist in the rear was not keeping a proper lookout or that he was following too closely.

*Id.* at 188, 146 S.E. 2d at 42 (emphasis supplied) (citations omitted). Defendants argue that the foregoing is merely dicta. We disagree. Our understanding of *Beanblossom, supra*, is that the foregoing statement of the law was necessary to the Court's holding with respect to that appellant's assignments of error relating to the jury charge in which the trial court attempted to apply the doctrine of foreseeability. *Id.* at 187, 146 S.E. 2d at 41 (citations omitted). In *Beanblossom, supra*, the Court also aptly stated the following:

In the absence of anything which should alert him to the danger, the law does not require a motorist to anticipate specific acts of negligence on the part of another. It does, however, fix him with notice that the exigencies of traffic may, at any time, require a sudden stop by him or the motor vehicle immediately in front of him. Constant vigilance is an indispensable requisite for survival on today's highways and a motorist *must* take into account 'occasional negligence which is one of the incidents of human life.' He *must* bear in mind that every operator of a motor vehicle on the highway is constantly confronted with the possibility of a collision with other vehicles, pedestrians, or animals; that blowouts and mechanical failures, highway and weather conditions, as well as innumerable other factors, can create sudden hazards. It follows therefore, that a reasonably prudent operator will not put himself unnecessarily in a position which will absolutely preclude him from coping with an emergency.

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**Masciulli v. Tucker**

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*Id.* at 187-88, 146 S.E. 2d at 41 (emphasis supplied) (citations omitted). The evidence in the case *sub judice* was that defendant Kleckner was operating the automobile under conditions in which it was raining and the pavement was wet; that she was able to discern that she was approaching an automobile in her lane of travel; that she saw the brake lights on the automobile but mistook the brake lights for taillights and assumed that the automobile was moving, but once realizing that the automobile was in fact stopped, she slammed on her brakes too late to avoid a rear end collision. Even without the testimony of two witnesses that a left turn signal was in operation, we hold that the foregoing constitutes sufficient evidence to raise an issue of fact for a jury to determine, to wit: whether defendant was maintaining a proper lookout. Evidence that a turn signal was in operation likewise raises a question for the jury to decide after being instructed on defendant's duty to maintain a proper lookout. The trial court's refusal to properly instruct the jury on the law regarding defendant's duty to maintain a proper lookout shielded defendant from possible liability. In this there was error. Should the jury have found that defendant did not maintain a proper lookout, it would have precluded a verdict that the doctrine of sudden emergency insulated defendant from liability.

[2] Plaintiff next assigns error to the trial court's denial of her request for an instruction to the jury on the law arising from the evidence presented of defendant's failure to maintain proper control of the automobile. This request was also improperly ruled on by the trial court. Although the case of *Redden v. Bynum*, 256 N.C. 351, 123 S.E. 2d 734 (1962), relied upon by plaintiff does provide us with some guidance, we note that the Court in *Redden* quoted the legal requirements of G.S. 20-141(c) which is no longer in effect. The Court stated the following:

The fact that the speed of a vehicle is less than the maximum limit provided by law 'shall not relieve the driver from the duty to decrease speed . . . when special hazards exist with respect to . . . other traffic or by reason of weather conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and duty of all persons to use due care. G.S. 20-141(c). Failure to observe this statutory duty renders a

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Masciulli v. Tucker

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motorist negligent; and such negligence may consist of traveling at excessive speed, failure to keep a proper lookout, or failure to maintain reasonable control of vehicle.

*Redden, supra*, at 354, 123 S.E. 2d at 736 (emphasis supplied). The principle enunciated in *Redden, supra*, remains the same under the effective version of G.S. 20-141. There has been a refinement of the distinction between the interrelated allegations of driving at an excessive rate of speed and failure to maintain proper control. See *Radford v. Norris*, 74 N.C. App. 87, 327 S.E. 2d 620, *disc. rev. denied*, 314 N.C. 117, 332 S.E. 2d 483 (1985). The trial court in the case *sub judice*, upon plaintiff's request for a jury instruction stated "Proper control is denied. No evidence of any loss of control in this case." This Court in *Radford, supra*, stated, "Maintaining proper control means driving in such a manner that the vehicle 'can be stopped quickly or with a reasonable degree of celerity, which does not mean instantly under any and all circumstances.'" *Radford, supra*, at 91, 327 S.E. 2d at 623, quoting 7A Am. Jur. 2d *Automobiles and Highway Traffic* sec. 415 (1980). The evidence in the case *sub judice* showed that defendant, while operating an automobile under hazardous conditions, perceived an automobile in her lane of travel, but despite her "slamming" on the brakes she was unable to maintain control of her automobile and slid into the rear end of the automobile in front of her. We hold the evidence in the case *sub judice*, to be sufficient under *Redden, supra*, to submit the issue for determination by the jury.

[3] Plaintiff also contends the trial court committed prejudicial error in its instructions to the jury on the applicability of the doctrine of sudden emergency in the case *sub judice*. We agree.

The lawful duty required of every motorist driving upon the roads of this State is that, "A motorist is required in the exercise of due care to keep a reasonable and proper lookout in the direction of travel and is held to the duty of seeing what he ought to have seen." *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 239, 311 S.E. 2d 559, 568 (1984), citing *Wall v. Bain*, 222 N.C. 375, 23 S.E. 2d 330 (1942). The state of the law on the doctrine of sudden emergency has been thoroughly stated by our courts. "One who is required to act in an emergency is not held by the law to the wisest choice of conduct, but only to such choice as a

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Masciulli v. Tucker

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person of ordinary care and prudence, similarly situated would have been." *Ingle v. Cassady*, 208 N.C. 497, 499, 181 S.E. 562, 563 (1935). However, the law of sudden emergency is not without limitations.

It is the duty of the trial court in a case allegedly involving a sudden emergency to not only instruct that a lesser standard of care is applied in an emergency situation, but also the trial court must instruct that the jury must find that in fact a sudden emergency did exist and that the jury must find that the emergency was in fact not brought on by the negligence of the defendants.

*Lawson v. Walker*, 22 N.C. App. 295, 297, 206 S.E. 2d 325, 327 (1974) (trial court's instruction to the jury held insufficient where the clear inference from the trial court's instructions was that the trial court felt that a baby falling from an automobile seat caused the sudden emergency whereby the sudden emergency was not caused by defendant). Moreover, "where a motorist discovers, or in the exercise of due care should discover, obstruction within the extreme range of his vision and can stop if he acts immediately, but his estimates of his speed, distance, and ability to stop are inaccurate and he finds stopping impossible, he cannot then claim the benefit of the sudden emergency doctrine." *Hairston, supra*, at 239, 311 S.E. 2d at 568. A broader statement of this proposition is that "one cannot escape liability for acts otherwise negligent because done under the stress of an emergency if such emergency was caused, *wholly or in material part*, by his own negligent or wrongful act." *Cockman v. Powers*, 248 N.C. 403, 407, 103 S.E. 2d 710, 713 (1958) (emphasis supplied).

The evidence in the case *sub judice* tends to show that defendant was driving at an excessive rate of speed (twenty-five miles per hour) for the *existing* conditions and subsequently pleaded guilty to that offense in District Court. Defendant described the accident as follows:

A. I was driving up a hill and right as I got to the top of the hill I had to go around a slight curve, and as I got to the top of the hill and went around the curve I then saw a car in front of me and saw what I guess are brake lights, but I thought they were taillights at the time because everyone

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Masciulli v. Tucker

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else had their lights on, and by the time I realized he wasn't moving I slammed on my brakes and slid into him.

Defendant did not testify that the automobile that she rear ended did not display a left turn signal; defendant merely testified "I saw no turn signal." However, Mr. Fryar testified "I was sitting there and I had my left signal on." The minor plaintiff testified "well, we stopped. He had on his blinker light. I know that because you can hear it, you could hear the blinker lights." Officer Smith testified that he spoke with defendant Kleckner immediately after the accident and "she just didn't see the vehicle when she realized that Mr. Fryar's vehicle was stopped, she put on her brakes but because of the wet pavement she was unable to stop, and slid into the rear of his vehicle." All the evidence presented in the case *sub judice* established that at the time of the accident the existing driving conditions were rain and wet pavement. There was no evidence of any nature about a sudden downpour or sudden change of driving conditions. Defendant's testimony and statements made to Officer Smith were such that a jury could infer that she made an error in judgment and, as discussed *supra*, she did not keep a proper lookout or maintain proper control of the automobile she was operating. This alleged emergency was not sudden and the rear end collision was caused at least in material part due to defendant's disregard of the *existing* conditions and mistaken assumption that Mr. Fryar's automobile was moving even though defendant testified that at least she saw the brake lights on the automobile ahead of her. Defendant may not escape liability by the court instructing the jury on the applicability of the doctrine of sudden emergency. *Cockman, supra*. The trial court erred by instructing the jury on the applicability of the doctrine of sudden emergency when the evidence did not support said instruction and plaintiff is entitled to a new trial. *Hairston, supra*; *Hoke v. Greyhound Corp.*, 227 N.C. 412, 42 S.E. 2d 593 (1947); *Bryant v. Winkler*, 16 N.C. App. 612, 192 S.E. 2d 686 (1972); *Johnson v. Simmons*, 10 N.C. App. 113, 177 S.E. 2d 721 (1970), *cert. denied*, 277 N.C. 726, 178 S.E. 2d 832 (1971).

For the aforementioned reasons plaintiff is entitled to a

New trial.

Judges WEBB and WHICHARD concur.

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**Jackson v. L.G. DeWitt Trucking Co.**

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SAM W. JACKSON v. L.G. DEWITT TRUCKING COMPANY, EMPLOYER, AND  
AETNA LIFE & CASUALTY INSURANCE COMPANY, CARRIER

No. 8610IC52

(Filed 5 August 1986)

**1. Master and Servant §§ 73.1, 94.1— workers' compensation—loss of vision—expert testimony—Industrial Commission's finding unsupported by evidence**

In a workers' compensation proceeding where the evidence was that plaintiff splashed diesel fuel in his eye, rubbed it vigorously, suffered hemorrhaging in the eye, and subsequently lost his vision, and where an expert medical witness testified that the rubbing of the eye "more likely than not" to a "reasonable degree of medical certainty" caused the subsequent hemorrhagic central retinal vein occlusion, the critical finding of the Industrial Commission that the witness testified only that the rubbing "possibly could have caused the condition he diagnosed" was not supported by competent evidence and is overturned.

**2. Master and Servant §§ 73.1, 94.1— workers' compensation—employee's rubbing of eye—loss of vision—finding as to causation required of Commission**

In a workers' compensation proceeding the Industrial Commission was required to make a specific finding as to whether plaintiff's vigorous rubbing of his eye significantly caused, aggravated, accelerated, or precipitated a hemorrhagic central retinal vein occlusion, and plaintiff would be entitled to compensation even if he had a predisposition toward developing this condition.

APPEAL by plaintiff from the opinion and award of the North Carolina Industrial Commission entered 15 July 1985. Heard in the Court of Appeals 15 May 1986.

*Vickory & Hawkins, by C. Branson Vickory, for plaintiff appellant.*

*Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by C. Ernest Simons, Jr. and Robin K. Vinson, for defendant appellee.*

BECTON, Judge.

In this workers' compensation case, the plaintiff, Sam W. Jackson, sought compensation for the loss of sight in his left eye. The Industrial Commission denied his claim, and Mr. Jackson appeals. We reverse and remand.

I

On 6 August 1983, Mr. Jackson was working as a long-distance truck driver for defendant L.G. DeWitt Trucking Company.



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**Jackson v. L.G. DeWitt Trucking Co.**

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Mr. Jackson was driving a tractor with a refrigerated trailer filled with produce. While in Oklahoma, Mr. Jackson stopped to check the temperature in the trailer. He discovered that the refrigeration unit had stopped because it had run out of fuel. While refueling the refrigeration unit by siphoning diesel fuel from the tractor, diesel fuel splashed into Mr. Jackson's eyes.

Mr. Jackson immediately began to rub his eyes vigorously. He attempted to remove the fuel with paper towels, water and commercial eye drops. Within hours, the vision in his left eye began to blur, and it continued to deteriorate. By 23 August 1983, he could no longer use his left eye, and he stopped driving the tractor.

A

On 24 August 1983, Mr. Jackson sought medical attention for his eye. He was examined by Dr. Charles Zwerling, an ophthalmologist. Dr. Zwerling's diagnosis of Mr. Jackson's eye condition was that he had suffered a hemorrhagic central retinal vein occlusion which was caused by the vigorous rubbing of the eye after the fuel had splashed into it. On Dr. Zwerling's recommendation, Mr. Jackson went to another ophthalmologist, Dr. James Holland, on 1 September 1983 for a second opinion. Dr. Holland concurred in the diagnosis of hemorrhagic central retinal vein occlusion.

Because they were surprised to see this type of condition in a person of Mr. Jackson's age (49), Drs. Holland and Zwerling agreed that Mr. Jackson should see a board-certified internist, Dr. James Stackhouse, to determine whether an underlying disease caused the occlusion. Dr. Stackhouse found no condition in Mr. Jackson that might have caused the occlusion.

Drs. Zwerling and Holland testified as experts before the deputy commissioner. Dr. Zwerling explained that hemorrhagic central retinal vein occlusions rarely occur in people under the age of 60 or 65. It usually occurs, for example, in older people with pre-existing conditions such as hyperviscosity syndrome, glaucoma, severe artery disease, or diabetes. Mr. Jackson had no history of any of these diseases or conditions. Dr. Zwerling testified that, based in part on his findings (and the findings of Drs. Holland and Stackhouse) that Mr. Jackson had no apparent predisposing factor or underlying disease causing the condition, "It

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**Jackson v. L.G. DeWitt Trucking Co.**

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was the rubbing of the eye from getting the fuel in the eye that caused the hemorrhage. This is my professional opinion." He continued:

[O]ne of the severe complications from central retinal vein occlusion, this is well documented in the literature by Dr. Hayre and his Associates, there are numerous articles on this, it is something called 90 day glaucoma and that is to say that after a serious injury of this nature, where the vein burst open and you have all this hemorrhage, anytime between that time of the injury and 90 days you can form abnormal blood vessels which can bleed again and cause more hemorrhaging and you run into a snowball effect and you can end up losing [sic] the eye. The only treatment for this is laser treatment . . . I treated him with laser treatment according to the standard protocols of the American Academy of Ophthalmology and he had excellent results, . . . but unfortunately Mr. Jackson still has no vision in the eye and he never will. The eye is permanently disabled.

Dr. Zwerling also testified that there are cases documented in medical literature of hemorrhagic central retinal vein occlusions caused by placing too much pressure on the globe of the eye during retinal detachment surgery or hitting a blood vessel in the back of the eye with a needle during cataract surgery. And although he found no cases in which rubbing the eye caused such a hemorrhage, he gave the following testimony:

To a reasonable degree of medical certainty, I believe in what Mr. Jackson has told me to be true and I believe it's quite possible that given the condition where they rub their eye that vigorously from getting diesel fuel, in which I have never had diesel fuel but I have had other things get in my eye and it hurts, you know, gasoline, what have you, and you can rub your eye hard enough, it is quite potentially possible, we would never really know unless we took a bunch of humans and said rub your eyes hard as you can or you know, we don't do that in this society but we have done this with lab animals and we have been able to induce central retinal vein occlusions by putting pressure on the eye, this is documented by Dr. Hayre out in the midwest, who is a professor and leading expert on this.

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**Jackson v. L.G. DeWitt Trucking Co.**

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At the end of Dr. Zwerling's testimony, the deputy commissioner asked him to clarify his opinion:

Q. Explain to me what you mean by possible?

A. Giv[en] my experience as an eye surgeon, in witnessing complications of eye surgery, that is to say retinal detachment surgery, cataract surgery, what have you, in which there is often a certain amount of pressure placed on the globe or the eyeball itself, I have seen cases myself personally where hemodynamic complications have occurred, arterial and venus occlusions have occurred. I have seen someone just walk off the street where this happened, where they "did to themselves,"—

Q. Do you mean by possible, to a reasonable degree of medical certainty?

A. To a reasonable degree of medical certainty, I believe—

Q. Does that mean more likely than not?

A. More likely, yes, than not.

Dr. Holland also testified that Mr. Jackson's condition is very unusual at his age with no history of an underlying disease associated with the condition and no indication of a penetrating trauma. He agreed that while there are documented cases of "penetrating" trauma, such as a needle puncturing the eye, causing this type of hemorrhage, there are no documented cases of a blunt, "non-penetrating" trauma, such as rubbing or hitting the eye, causing such a hemorrhage: "To my knowledge, blunt, non-penetrating trauma has never been associated with a central retinal vein occlusion."

Dr. Holland further testified that patients sometimes recognize they have vision impairment only after some unrelated incident involving the eye when, in fact, the onset of the impairment might have occurred before the incident. He also testified that his examination on 1 September 1983 revealed that Mr. Jackson had a slightly elevated pressure in his eyes. According to Dr. Holland, 24 is considered normal pressure. On 24 August 1983, Dr. Zwerling had found Mr. Jackson's eye pressure to be 20 in each eye, which is also considered normal. On 1 September 1983, the pressure was 26 in the right eye and 28 in the left. This is considered

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**Jackson v. L.G. DeWitt Trucking Co.**

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in the high range of normal. According to one medical theory, high pressure in the eye may be connected with the development of vein occlusions. But because there is no conclusive support for this theory, and because Mr. Jackson's pressure was normal on 24 August and only "moderately elevated" one week later (and a person's eye pressure tends to vary according to time of day and stress), Dr. Holland could not say to a reasonable degree of medical certainty whether this condition predated the 6 August incident. He also could not say to a reasonable degree of medical certainty either that the rubbing of the eye caused or that it did not cause the hemorrhagic central retinal vein occlusion.

**B**

The parties stipulated that Mr. Jackson suffered an injury by accident while on the job—namely, that fuel splashed in his eyes resulting in burning and itching and causing him to rub his eyes. The deputy commissioner found as fact:

6. . . . . It was Dr. Zwerling's opinion that the rubbing of plaintiff's eye subsequent to the introduction of the diesel fuel possibly could have caused the condition he diagnosed.

. . . . .

8. On August 6, 1983, plaintiff sustained an injury as the result of an interruption of his normal work routine by the introduction of an unusual condition likely to result in unexpected consequences. This injury, the subsequent burning and itching of plaintiff's eye, was however transient. Plaintiff's hemorrhagic central retinal vein occlusion was not causally related to plaintiff's injury, but only temporally related thereto.

And he made the following conclusions of law:

1. On August 6, 1983, plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant employer, however, this injury did not result in any compensable consequences. G.S. 97-2(6).

2. Plaintiff's hemorrhagic central retinal vein occlusion was not caused or aggravated by the injury by accident on August 6, 1983 but was only temporally related thereto. G.S. 97-2(6).

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**Jackson v. L.G. DeWitt Trucking Co.**

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The deputy commissioner denied compensation, and a majority of the Commission, Commissioner Clay dissenting, adopted and affirmed his opinion and award.

## II

[1] As an initial matter, we conclude that the quoted portion of the sixth finding of fact materially misstates Dr. Zwerling's testimony. The deputy commissioner elicited the clear opinion of Dr. Zwerling at the hearing that the rubbing of the eye "more likely than not," to a "reasonable degree of medical certainty," caused the hemorrhagic central retinal vein occlusion. Indeed, the only other expert testimony elicited at the hearing was equivocal on whether there was or was not a causal connection between the two events. The critical finding that Dr. Zwerling testified only that the rubbing "possibly could have caused the condition he diagnosed" is not supported by competent evidence. It is overturned. *Hundley v. Fieldcrest Mills*, 58 N.C. App. 184, 292 S.E. 2d 766 (1982) (findings of fact must be supported by competent evidence).

[2] Next we consider Mr. Jackson's arguments that the Commission erred in its interpretation and application of N.C. Gen. Stat. Sec. 97-2(6) (1985), which provides in relevant part:

Injury.—"Injury and personal injury" shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident.

The Commission defined the injury to Mr. Jackson as the "burning and itching of plaintiff's eye," caused by the splashing of fuel. The Commission found and concluded that *this* injury was transient and did not cause or aggravate the hemorrhagic central retinal vein occlusion. This analysis is incomplete. It ignores the fact that the burning and itching caused Mr. Jackson to rub his eyes vigorously which, in turn, might have caused the hemorrhage. The medical testimony was clear that neither the fuel nor the burning and itching caused the hemorrhage. But, according to Dr. Zwerling, the rubbing of the eye more likely than not did cause the hemorrhage. We agree with Mr. Jackson that the vigorous rubbing of the eye was as much a natural and unavoidable consequence of the entry of fuel into the eye as was the burning

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**Jackson v. L.G. DeWitt Trucking Co.**

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and itching. Therefore, the Commission must make a specific finding whether the vigorous rubbing was causally related to the hemorrhagic vein occlusion.

Mr. Jackson also argues that the Commission acted under a misapprehension of the law. Specifically, he argues that the Commission erroneously believed that if Mr. Jackson had a latent hemorrhagic central retinal vein occlusion before 6 August 1983, that it was necessarily a noncompensable disease under G.S. Sec. 97-2(6). The law is clear, however. Evidence that a work-related injury aggravated or accelerated a pre-existing condition or disease is sufficient to support a compensation award on the facts of this case. *See Wyatt v. Sharp*, 239 N.C. 655, 80 S.E. 2d 762 (1954) (pre-existing heart condition); *see also Weaver v. Swedish Imports Maintenance, Inc.*, 61 N.C. App. 662, 301 S.E. 2d 736 (1983) (Despite some evidence of arteriosclerosis and high blood pressure, claimant's heart attack was compensable injury by accident under G.S. Sec. 97-2(6) because it was precipitated by unusual exertion.).

The case at bar is distinguishable from cases cited by defendant in which there was at least some expert medical testimony that a pre-existing disease, and not the work-related activity, caused the disabling condition. *See, e.g., Bellamy v. Morace Stevedoring Company*, 258 N.C. 327, 128 S.E. 2d 395 (1962). No such testimony appears in the record of this case. Mr. Jackson had no apparent predisposition toward the condition; he was atypically young; and the physical development of the hemorrhagic vein occlusion was entirely consistent with the only medical explanation offered, which stated that the (work-related) rubbing caused the hemorrhage which then caused the other symptoms. Moreover, in the case at bar there is clear evidence of an obviously unusual and accidental event, rather than normal work activity, that might have caused the hemorrhage. *Compare Bellamy; King v. Exxon Company*, 46 N.C. App. 750, 266 S.E. 2d 37, *disc. rev. denied*, 301 N.C. 92, 273 S.E. 2d 299 (1980).

The Commission apparently believed Mr. Jackson's hemorrhagic central retinal vein occlusion was caused by a pre-existing disease. It found that the temporary burning and itching of Mr. Jackson's eye did not aggravate the occlusion. The Commission failed to make any findings or conclusions on whether the vigor-

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**Jackson v. L.G. DeWitt Trucking Co.**

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ous rubbing of the eye, which was a natural reflex flowing from the fuel-splashing accident on the job, caused, aggravated, accelerated, or precipitated claimant's condition.

Of course, it might have been simply fortuitous that the onset of the hemorrhagic vein occlusion followed soon after the vigorous rubbing. Nonetheless, it appears to this Court that the Commission erroneously believed Mr. Jackson's loss of sight in his eye was compensable only if both (1) the burning and itching directly caused the hemorrhagic central retinal vein occlusion and (2) Mr. Jackson did not have a predisposition toward such an occlusion. Neither condition is required. The Commission may award compensation in this case if it finds that the burning and itching caused Mr. Jackson, through a natural reflex, to vigorously rub his eyes and that the rubbing caused, aggravated, accelerated, or precipitated the hemorrhagic vein occlusion, even if Mr. Jackson were to have a predisposition toward developing this condition. In fact, in order to deny compensation, the Commission must find and conclude that the vigorous rubbing did not significantly cause, aggravate, accelerate, or precipitate the occlusion. *Cf. Jackson v. Fayetteville Area System of Transportation*, 78 N.C. App. 412, 337 S.E. 2d 110 (1985) (Conclusions must be supported by specific findings.).

### III

One of the medical expert witnesses testified to a reasonable degree of medical certainty that the vigorous rubbing caused the loss of sight in claimant's left eye. The other expert witness could not testify to a reasonable degree of medical certainty that the rubbing did, or that it did not, cause the loss of sight. We remand the case for the Commission to make fair and accurate findings of fact as to the specific content of Dr. Zwering's testimony. The Commission is free to assess the credibility of the witness and to weigh the evidence. It must also make a specific finding as to whether the vigorous rubbing of the eye significantly caused, aggravated, accelerated, or precipitated the hemorrhagic central retinal vein occlusion.

For the reasons set forth above, we

Reverse and remand.

Judges ARNOLD and WELLS concur.

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**E. L. Scott Roofing Co. v. State of N. C.**

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**E. L. SCOTT ROOFING CO., INC. v. STATE OF NORTH CAROLINA AND PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY**

No. 8610SC156

(Filed 5 August 1986)

**State § 2.2— repairs to roof—damage to interior of building—roofer not contractually liable**

The trial court erred in concluding as a matter of law that plaintiff was contractually liable to the State for damage to the interior of a building sustained during a rainfall after some unknown third person walked on and damaged a temporary roof installed by plaintiff at the State's direction, since neither plaintiff nor its men nor subcontractors caused the damage to the temporary roof; plaintiff met the obligation of its contract that it "provide cover and protect all portions of the structure when the work is not in progress" by installing the temporary roof and ventilation hatch cover before leaving the job site; plaintiff could not be held liable for interior damages under the contract provision that "[a]ny work damaged through the lack of proper protection or from any other cause shall be repaired or replaced without extra cost to the owner," since only the temporary roof, which plaintiff promptly repaired, and not the repairs to the underlying structure constituted work within the meaning of the contract; plaintiff's failure to conform with the contractual requirements to place barriers to protect people on the work site could not be used to hold it liable for damage to the structure; reliance on the "usual custom and practice in the industry" would not result in liability in this case; and the building in question was not damaged "during the course of the work" by plaintiff so as to impose liability on plaintiff.

APPEAL by plaintiff from *Read, Judge*. Judgment entered 13 September 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 11 June 1986.

Plaintiff, E. L. Scott Roofing Co., Inc. (Scott), brought this action pursuant to G.S. 143-135.3 to recover sums allegedly due it under a contract for repairs to the roofs of several buildings, including Dudley Hall, on the campus of North Carolina A & T State University. The stipulated facts show that during the course of the work on Dudley Hall, Scott discovered that the metal decking which supported the roof had deteriorated to the extent that a new roof could not be installed according to the State's plans and specifications. This discovery necessitated a delay in the project in order that additional design work could be accomplished by the State's architect and additional funding could be obtained. Scott was instructed to install a temporary roof pending approval of a change order for the additional work. Scott



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**E. L. Scott Roofing Co. v. State of N. C.**

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installed the temporary roof and left the job site. Thereafter, rainwater leaked through the temporary roof, causing damage to the interior and contents of Dudley Hall totalling \$41,859.84. Inspection of the temporary roof revealed that it had been damaged by either some unknown cause or by someone walking on it. The parties stipulated that no employee or representative of Scott had walked on the temporary roof. Scott repaired the temporary roof.

After the change order for replacement of the metal decking was approved, Scott returned to the site and completed the repairs to the roof of Dudley Hall. The State withheld the sum of \$41,859.84 from final payment to Scott, contending that Scott is liable, under the terms of its contract, for the damages caused by the leak in the temporary roof.

Scott was insured against contractual liability for property damage by the terms of a general liability insurance policy issued by defendant Pennsylvania National Mutual Casualty Insurance Company (Pennsylvania National). The parties stipulated that Pennsylvania National is obligated to reimburse Scott for any amount which the State properly withheld from Scott for damages to Dudley Hall.

As provided by G.S. 143-135.3, the case was heard by the trial judge, without a jury. The court found, *inter alia*, the following facts:

3. During August, 1982, plaintiff discovered that metal decking supporting the existing roof was rusted beyond the point where it would be safe to install a new roof without replacement of the metal decking. This finding necessitated a delay to allow the State of North Carolina time to design a new roof support system and obtain funds for the additional work needed.

4. Plaintiff installed a temporary roof on the portion of Dudley Hall where the existing roof had been removed. The temporary roof was fragile in nature and could be damaged by persons walking on it. Such damage could reasonably be expected to allow intrusion of water into the building. Plaintiff's subcontractor, Seeger Waterproofing, continued to perform work in waterproofing the parapet wall on Dudley Hall.

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**E. L. Scott Roofing Co. v. State of N. C.**

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Plaintiff informed representatives of Seeger of the existence of the temporary roof and that "extraordinary care" was needed to be taken to protect it. Plaintiff also informed Mr. Eugene Midyette, the architect who was then acting as the representative of the State of North Carolina in regard to that contract, that the temporary roof was in place. Plaintiff then left the project.

5. Plaintiff and Seeger's only method of access to the roof was through a ventilation hatch opened by plaintiff for that purpose. By means of a ladder from the interior of the building's third floor, workmen could climb directly through the ventilation hatch onto the roof. Upon leaving the project, plaintiff placed a cover over the hatch to prevent water from getting through it. The cover was not secured in place and was easily removable by workmen.

6. No ropes with banners, barricades or signs were placed anywhere to give warning of the fragile nature of the temporary roof or to prevent persons from walking on it. Placement of such warning devices where fragile or hazardous conditions exist is the usual and customary practice in the construction industry.

7. Simultaneously with plaintiff's work and known to plaintiff, another independent contractor was performing exterior work consisting of replacing, repairing and painting exterior trim on campus buildings including Dudley Hall. In order to reach the upper levels of buildings of that height, they employed a swinging stage which is a scaffold suspended by ropes or cables from hooks over the roof parapet wall and utilizes a safety device referred to as a "dead man's tie." The customary practice in the construction industry is to go upon the roof in order to attach the swinging stage. This method was used on Dudley Hall by the other independent contractor. Plaintiff's subcontractor observed workmen on the roof of Dudley Hall attaching the swinging stage but did not warn the workmen of the fragile nature of the temporary roof or the resulting damage that would ensue from walking on it.

8. On or about September 26, 1982, a rainfall occurred. The temporary roof had been damaged and heel marks were observed on it. Rainwater leaked through the damaged por-

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E. L. Scott Roofing Co. v. State of N. C.

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tion and caused damage to the interior of the building and contents thereof resulting in monetary damage to defendant in the sum of \$41,859.84.

9. In reliance upon contractual provisions regarding plaintiff's responsibilities for protection of the work, property and the public, defendant withheld that sum of money from plaintiff at the completion of the project.

The trial court concluded that Scott had a duty imposed by the contract to protect the building and its contents from damage while the work was in progress and while it was not in progress; that Scott's failure to prevent access to the roof and to warn and prevent others from walking on the roof was a breach of its contractual duty; and that the damage to the building and its contents was a reasonably foreseeable result of that breach. Thus the court concluded that the State had properly withheld from Scott an amount equal to the damage to the building and denied Scott any recovery on its contract with the State. Pursuant to the insurance policy and the parties' stipulation, judgment was entered awarding Scott a recovery of \$41,859.84 as against Pennsylvania National. Both Scott and Pennsylvania National appeal.

*Attorney General Lacy H. Thornburg, by Special Deputy Attorney General T. Buie Costen, for the State.*

*White, Allen, Hooten, Hodges & Hines, by John M. Martin, for plaintiff appellant.*

*Henson, Henson & Bayliss, by Perry C. Henson, Jr. and J. Victor Bowman, for Pennsylvania National Casualty Insurance Company, defendant appellant.*

MARTIN, Judge.

Scott and Pennsylvania National, having filed a joint brief in this Court, take the same position on appeal. They contend the trial court erred in concluding as a matter of law that Scott was contractually liable to the State for damages to the interior of Dudley Hall. We agree.

The State neither alleges nor contends that Scott was negligent in any respect in its performance of the work; rather the State claims that it had the right to withhold the \$41,859.84 from

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**E. L. Scott Roofing Co. v. State of N. C.**

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its payment to Scott because Scott breached certain provisions of the contract. The State contends the following contractual provisions support the trial court's findings and conclusions that Scott and its insurer Pennsylvania National are liable for the damages:

**ARTICLE 12.**

The Contractors shall be jointly responsible for the entire site and the building or construction of the same and provide all the necessary protections, as required by the Owner or Engineer or Architect, and by laws or ordinances governing such conditions. They shall be responsible for any damage to the Owner's property, or of that of others on the job, by them, their men, or their sub-contractors, and shall make good such damages. They shall be responsible for and pay for any claims against the Owner. All prime contractors shall have access to the project at all times.

The Contractor shall provide cover and protect all portions of the structure when the work is not in progress; provide and set all temporary roofs, covers for doorways, sash and windows, and all other materials necessary to protect all the work on the building, whether set by him, or any of the sub-contractors. Any work damaged through the lack of proper protection or from any other cause, shall be repaired or replaced without extra cost to the Owner.

. . . .

The Contractor shall provide for all necessary safety measures for the protection of all persons on the work, including the requirements of the A.G.C. Accident Manual in Construction as amended, and shall fully comply with all State laws or regulations and Building Code requirements to prevent accident or injury to persons on or about the location of the work. He shall clearly mark or post signs warning of hazards existing, and shall barricade excavations, elevator shafts, stair wells and similar hazards; he shall protect against damage or injury resulting from falling materials; he shall maintain all protective devices and signs throughout the progress of the work.

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E. L. Scott Roofing Co. v. State of N. C.

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## ARTICLE 36

. . . .

*Care of Buildings and Grounds:* All Contractors are responsible for protection of the buildings and grounds on which they are working and shall pay for any repair, replacement or repainting any parts or elements of the buildings or grounds damaged or destroyed during the course of the work.

A contract is to be construed according to the intention of the parties as ascertained from the words used in the contract as well as the subject matter, desired results, and purposes thereof, and the situation of the parties at the time the contract is made. *State Highway Commission v. L. A. Reynolds Co.*, 272 N.C. 618, 159 S.E. 2d 198 (1968). Applying this rule of construction to the contract entered into by Scott and the State, we hold that Scott is not liable.

The first paragraph of Article 12 provided that Scott "shall be responsible for any damage to the Owner's property, or that of others on the job, by them, their men, or their sub-contractors, and shall make good such damages." The record reveals no evidence, nor did the trial court find that Scott, its men, or its sub-contractors, cause the damages to the temporary roof that allowed the rainfall to leak into and damage the building. The damage to the roof was caused by some unknown third person. Thus, Scott cannot be held liable for the damage under this portion of the contract.

Paragraph two of Article 12 provided that Scott "shall provide cover and protect all portions of the structure when the work is not in progress . . . ." Scott met this obligation when it installed the temporary roof and ventilation hatch cover before leaving the job site. The fact that the hatch cover was not secured in place is of no consequence in view of the trial court's finding that other contractors required access to the roof in order to complete their work.

The same paragraph also provided that "[a]ny work damaged through the lack of proper protection or from any other cause shall be repaired or replaced without extra cost to the Owner." In determining whether the court properly concluded that the appel-

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E. L. Scott Roofing Co. v. State of N. C.

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lants were liable under this provision we must determine the meaning of the term "work" as it is used in this contract. When a contract defines a term, that definition is to be used. *Woods v. Insurance Co.*, 295 N.C. 500, 246 S.E. 2d 773 (1978). Work is defined in this contract as follows: "'work,' as used herein as a noun, is intended to include materials, labor and workmanship of the appropriate contractor." The damages for which the State withheld the \$41,859.84 were for neither materials, labor nor workmanship of Scott; the damages were for repairs to the underlying structure of Dudley Hall occasioned by water leakage and caused by the actions of some unknown third party who damaged the temporary roof which Scott had placed on the building. Under the terms of the contract only the temporary roof, which Scott promptly repaired, constituted "work" within the meaning of the contract. Thus, the State's claim cannot be sustained by reliance upon this clause of the contract.

Scott's liability was also predicated upon its failure to place banners, barricades or signs to warn of the fragile nature of the roof and to prevent people from walking upon it. The court found, and Scott does not contest the fact, that there were no banners, barricades or signs placed around the roof. The court concluded that Scott's failure to place barricades was a breach of the contract which supported the State's action in withholding the funds. The contract required Scott "to provide all necessary safety means for the protection of all *persons* on the work." (Emphasis added.) Included as a part of the requirement for the protection of persons on the work was the marking or posting of signs warning of the hazards which existed. However, the trial court did not find that the temporary roof constituted a hazard, requiring warnings to prevent injury to persons. The trial court's reliance upon this provision to support Scott's liability for the damages to Dudley Hall is misplaced. The unambiguous language of the contract shows that the provisions relating to signs and barriers were intended for the protection of persons on the job site and not for the protection of the property upon which the work was being performed. Scott's failure to conform with the contractual requirements to place the barriers to protect people on the work site cannot be used to hold it liable for damage to the structure.

Nor does the court's finding with respect to the "usual custom and practice in the industry" result in liability in this case.

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E. L. Scott Roofing Co. v. State of N. C.

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A custom or usage may be proved in explanation and qualification of the terms of a contract which otherwise would be ambiguous, . . . but evidence of a usage or custom is never admitted to make a new contract or to add a new element to one previously made.

*Lester Brothers, Inc. v. J. M. Thompson Co.*, 261 N.C. 210, 218, 134 S.E. 2d 372, 378 (1964) (quoting 55 Am. Jur., Usages and Customs § 31).

Finally, we must determine whether the provision set forth in Article 36 of the Contract regarding care of buildings and grounds supports the court's judgment. The issue which must be determined with respect to Article 36 is whether Dudley Hall was damaged "during the course of the work" by Scott.

The term "during the course of the work" is not defined in the contract, thus, the presumption is that these words are to be given their ordinary significance. *Lester Brothers, Inc. v. J. M. Thompson Co.*, *supra*. Webster's New World Dictionary (2d College Edition 1974) defines "in the course of" as being "in the progress or process of; during." Applying this definition to the term "during the course of work" we hold that this term was meant to encompass only that time while Scott was actually engaged in working on the Dudley Hall project. Once Scott, at the State's direction, placed a temporary roof on the building, discontinued its work, and left the premises to await further authorization from the State, the work was no longer in progress until that authorization was given. Thus, Scott could not be held liable under that portion of Article 36 relied upon by the court to impose liability. To interpret the clause otherwise would make Scott a virtual insurer of the building against the acts of third persons even when it had no control over these persons or over the premises. We do not believe that the parties intended or contemplated such a duty when they entered into the contract.

None of the provisions of the contract make the appellants liable for the water damage to Dudley Hall. The judgment of the trial court is reversed and the case remanded for entry of judgment consistent with this opinion.

Reversed and remanded.

Judges WHICHARD and PHILLIPS concur.

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**Lyerly v. Malpass**

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CARL W. LYERLY, ET UX., ET AL. v. ALEX MALPASS, ET AL.

No. 865SC81

(Filed 5 August 1986)

**1. Deeds §§ 18, 20— amenities in subdivision—covenants by developer**

While there may have been no written document in which defendant developer expressly agreed to build a boat basin, dredge a channel to certain minimum requirements and construct a road to specifications, there was clearly an implied promise as part of the contract of purchase and sale arising from the covenants, plats, and oral representations that defendant would complete these amenities.

**2. Deeds §§ 18, 20— amenities in subdivision—implied promise by developer**

A developer may not by the use of recorded plats and restrictive covenants create the illusion of a high quality subdivision and then shield itself from responsibility by claiming that it did not promise to construct the amenities implied by the restrictive covenants and that these covenants do not give rise to an affirmative obligation, since to permit such conduct would be to condone deception.

**3. Contracts § 21— amenities in subdivision—substantial performance of developer—no defense in action for specific performance**

In an action for specific performance of a contract to build a boat basin, access channel, and a paved access road, there was no merit to defendant's contention that it had "substantially performed" its duties under the contract and that plaintiff, if entitled to any relief at all, was entitled only to nominal damages, since "substantial performance" enables a performing party to recover the full contract price for something less than full and exact performance; the doctrine is not available as a defense in a suit against that party for damages or specific performance; and performance cannot be deemed "substantial" in character when the purposes and ends of the promised performance have been defeated by the non-performance, as in this case with the channel which was 80% dredged, but the purpose of which was completely frustrated by the part which remained undredged.

**4. Vendor and Purchaser § 5— amenities in subdivision—purchasers entitled to specific performance**

Plaintiffs were entitled to specific performance in their action to require defendant to build a boat basin, access channel, and paved access road.

APPEAL by defendant Inlet Point, Inc. from *Stevens (Henry), Judge*. Judgment entered 14 June 1985 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 4 June 1986.

Plaintiffs are purchasers and owners of various lots in the Inlet Point Subdivision in New Hanover County. They initiated this action, alleging that defendants had pledged to build a boat basin for the residents of the subdivision and an access channel to the



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**Lyerly v. Malpass**

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Intracoastal Waterway. The basin and channel were to be a minimum depth to allow ingress and egress at low tide, and concrete panels were to be installed along the boat basin to prevent erosion.

Plaintiffs' complaint further alleges that defendants had promised to construct a paved access road, called Inlet Point Drive, connecting the subdivision to U.S. Highway 421. Plaintiffs alleged that the street had been left unpaved, with improper drainage, causing severe erosion problems and making automobile passage nearly impossible.

Plaintiffs alleged that the representations by defendants concerning the basin were relied upon by plaintiffs in purchasing their lots. Their complaint prayed for an order compelling defendants to specifically perform their obligations.

Defendants answered, generally denying the allegations, and setting forth the affirmative defenses of laches, failure of consideration, the statute of limitations and the statute of frauds. The parties waived jury trial and the trial judge heard the evidence. At the close of plaintiffs' case, the judge granted a directed verdict as to all defendants except Inlet Point, Inc. (herein defendant or Inlet). At the close of all the evidence, judgment was entered for the plaintiffs. Inlet was ordered to dredge the basin and channel to a minimum depth of six feet at mean low tide and to grade and pave Inlet Point Drive with an asphalt surface one and one-half inches thick and twenty feet wide. Defendant appeals.

*William F. Simpson, Jr., for plaintiffs-appellees.*

*L. Gleason Allen for defendant-appellant Inlet Point, Inc.*

PARKER, Judge.

When the trial court sits as the trier of fact without a jury, Rule 52(a) of the N.C. Rules of Civil Procedure requires the court to "find the facts specially and state separately its conclusions of law thereon . . . ." The appellate courts are bound by the trial courts' findings of fact so long as there is some evidence to support those findings, even though the evidence could sustain findings to the contrary. *In re Montgomery*, 311 N.C. 101, 316 S.E. 2d 246 (1984). The trial judge weighs the evidence, passes upon the credibility of witnesses and the weight to be given their testi-

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**Lyerly v. Malpass**

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mony, and draws the reasonable inferences therefrom. *See In re Whisnant*, 71 N.C. App. 439, 322 S.E. 2d 434 (1984).

The evidence presented at trial tended to show that defendant Inlet was the developer of a subdivision in New Hanover County. According to the subdivision plats filed with New Hanover County, this subdivision was to include a boat basin with a channel for access to the Intracoastal Waterway. The channel was to be approximately 250 feet long, thirty feet wide and a minimum of six feet deep at mean low tide. All plaintiffs claimed that this basin with its access to deep water was the major attraction for them when buying their lots.

Also shown on the recorded plat was Inlet Point Drive, a private road providing the subdivision with access to U.S. Highway 421. The plat stated that the street was "to be built to North Carolina Department of Transportation specifications." The plaintiffs testified that the developer's agents had promised them that the road would be paved all the way to Highway 421.

Plaintiffs' evidence further showed that the channel had a depth of only eighteen to twenty-four inches over a thirty-foot stretch and was impassable at low tide. The owner of a marine construction company with dredging experience testified that the material blocking the channel was solid shell, making it apparent to him that that material had never been dredged. He testified that such an amount of hard material would take hundreds of years to accumulate. As for the road, the evidence for plaintiffs was that the road had been paved earlier, but the developer's construction equipment had broken it up badly. Plaintiffs were promised by agents of the developers that the road would be resurfaced.

Defendant's evidence was that construction of the road and channel had been completed, and according to the subdivision covenants, completion of construction ended its responsibility over them. The blockage in the channel, defendant contended, was simply silt which could be cleared by routine maintenance. The covenants provided that as soon as four lots were sold, a Homeowner's Association would be formed to take over maintenance of the road, basin and channel. Four lots have been sold, but no association has been formed. Defendant contended that the plaintiffs were responsible for maintenance of the road and channel, because it was their duty to form the Homeowner's Association.

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**Lyerly v. Malpass**

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From this conflicting evidence, the trial court made the following pertinent findings of fact:

15. That said recorded plats in Map Book 18 Page 113 and Map Book 19 Page 37 show Inlet Point Drive running from the eastern right-of-way of U.S. 421, to its terminus 2,364 feet S. 86 degrees 20 minutes East and having a 60-foot right-of-way.

16. That the aforesaid recorded plats recite that the streets in Inlet Point Subdivision will be built to the specifications of the North Carolina Department of Transportation (now the Division of Highways) and the specifications of New Hanover County.

17. That said Inlet Point Drive was to be paved for the aforesaid distance with 1½ inches of asphalt with a width of 20 feet.

18. That plaintiffs were told that Inlet Point Drive would be paved for its entire length prior to their purchase of their lots by Charles C. Lewis, Sr.

19. That the boat basin located behind the lots belonging to plaintiffs in Inlet Point Subdivision was to be dredged to a depth of six feet at mean low water.

20. That the channel leading from the boat basin to the Intracoastal Waterway was to be dredged to a depth of six feet at mean low water.

21. That the restrictive covenants required the plaintiffs to maintain Inlet Point Drive once it was completed and also required them to maintain the channel and the boat basin at a depth of six feet at mean low water once they had been dredged to said depth.

22. That plaintiffs have been unable, since the purchase of their lots until the present, to enter or exit the boat basin with their boats at low tide because the channel has not been dredged to a depth of six feet at mean low water.

23. That a portion of Inlet Point Drive has been paved with 1½ inches of asphalt with a width of 20 feet but not for its entire length.

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**Lyerly v. Malpass**

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24. That plaintiffs were told that the boat basin and channel to the Intracoastal Waterway would be dredged to a depth of six feet at mean low water prior to the purchase of their lots by Charles C. Lewis, Sr.

25. That some dredging has been done in the boat basin and the channel from said basin to the Intracoastal Waterway but that neither are six feet deep at mean low water.

From its factual findings, the trial court concluded that the duties imposed on plaintiffs by the restrictive covenants imposed a concomitant duty on Inlet to construct the roads, streets, boat basin and channel as represented, that the existence of these amenities was an inducement to and part of the consideration for the purchase of the lots by plaintiffs and that Inlet had breached its contract; specific performance was awarded as stated earlier.

[1] Defendant argues that the trial court erred in ordering it to dredge the basin and channel and resurface the road. Defendant contends that there was no contract between plaintiffs and defendant and argues that the court erred in concluding that the deeds from defendant and its agents are contracts. The basis of defendant's argument is that Inlet was not the grantor in all plaintiffs' deeds. From the record, this fact is undisputed. On the face of the deed to Warren F. DeLong, Charles C. Lewis & Associates was the grantor and in the deed to the Lyerlys, Charles C. Lewis Associates, Inc. was the grantor. However, in our view, the conclusion that the deeds are contracts is not necessary to support the trial court's judgment. Therefore, the error, if any, was not prejudicial. There is evidence that defendant Malpass and defendant Charles C. Lewis, Sr., both stockholders in Inlet, considered Lewis to be the salesperson for development of the subdivision for Inlet. Lewis testified that the money from the sale of the lot to the Lyerlys went to Inlet. This evidence is sufficient to support the finding that Lewis was the agent of Inlet to develop the subdivision even though record title to the lots had been put in Lewis' partnership to facilitate obtaining financing for construction.

The restrictive covenants were recorded in the public registry and were incorporated by reference into the deed delivered to each plaintiff. The pertinent provisions of the restrictive covenants referred to in the deeds clearly contemplate that

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Lyerly v. Malpass

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the roads within the subdivision, the boat basin and the channel would be completed by the developer, with a homeowner's group to be formed later to take over the maintenance of these amenities. Additionally, the trial court found as fact that the plats showed these amenities and that agents of defendant had orally represented to plaintiffs that these amenities would be built.

While there may be no written document in which defendant Inlet expressly agreed to build the basin, dredge the channel to certain minimum requirements and construct the road to specifications, there was clearly an implied promise as part of the contract of purchase and sale arising from the covenants, plats and oral representations that Inlet would complete these amenities. Such an implied promise arises from the words used and is based on the presumed intention of the parties.

[2] A developer may not by the use of recorded plats and restrictive covenants create the illusion of a high quality subdivision and then shield itself from responsibility by claiming that it did not promise to construct the amenities implied by the restrictive covenants and that these covenants do not give rise to an affirmative obligation. To permit such conduct would be to condone deception. Note should be taken that the restrictive covenant at issue in the instant case is not substantively the same type covenant historically contained in restrictive covenants such as setback lines, height of fences, and size of houses, all of which place a limitation on the owner. Here by contrast, the grantees are burdened with an affirmative obligation to maintain an amenity, the completion of which was an inducement for buying in the subdivision. The trial court's findings of fact are supported by competent evidence and are thus conclusive on appeal. See *Montgomery, supra*. Those findings are sufficient to support the conclusions of law. Therefore, the only question remaining is the relief to which plaintiffs are entitled.

[3] Inlet contends that if plaintiffs are entitled to any relief at all, it would be only nominal damages, as Inlet claims to have "substantially performed" its duties under the contract, because the access road is passable and partially paved and that only a thirty-foot length of a 250-foot channel is too shallow. This argument is a misunderstanding of the doctrine of substantial performance. "Substantial performance" enables a performing party

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**Lyerly v. Malpass**

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to recover the full contract price for something less than full and exact performance. The doctrine is not available as a defense in a suit against that party for damages or specific performance. 3A *Corbin on Contracts* § 702 (1984 Supp., Part 1). Further, performance cannot be deemed "substantial" in character when the purposes and ends of the promised performance have been defeated by the nonperformance as in the case of the channel. *Id.*, § 706. Even though the channel is eighty percent dredged, its purpose is completely frustrated by the part which remains undredged.

[4] Inlet next contends that, even if plaintiffs have proved a breach of contract, they are only entitled to money damages, not specific performance. Specific performance

'will be granted or withheld by the court according to the equities of the situation as disclosed by a just consideration of all the circumstances of the particular case, and no positive rule can be laid down by which the action of the court can be determined in all cases.'

*Byrd v. Freeman*, 252 N.C. 724, 730, 114 S.E. 2d 715, 720 (1960), quoting 49 Am. Jur., *Specific Performance* § 8. Thus, the decision to grant or deny specific performance is one vested largely in the discretion of the trial court. See *Taylor v. Bailey*, 49 N.C. App. 216, 271 S.E. 2d 296 (1980).

The remedy of specific performance is available to compel a party to do precisely what he ought to have done without compulsion. *Munchak Corp. v. Caldwell*, 301 N.C. 689, 273 S.E. 2d 281 (1981). Thus, the existence of a remedy at law will not automatically preclude specific performance where the legal remedy is not as efficient and practical in meeting the needs of the aggrieved party. *Rose v. Rose*, 66 N.C. App. 161, 310 S.E. 2d 626 (1984). In this case, money damages could have been awarded to enable plaintiffs to hire their own contractors to dredge the channel and pave the street. However, because plaintiffs are an unorganized group of individual lot owners, that remedy would not be as efficient and practical as simply requiring Inlet to do what it had promised to do in the beginning. There was no error by the trial court in awarding specific performance.

Inlet's final contention is that the trial court erred in finding as fact the street specifications of the North Carolina Division of

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**Bottomley v. Bottomley**

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Highways where no evidence of those specifications was presented. The trial court found that those specifications required one and one-half inches of asphalt over a twenty-foot width. The court also found that part of Inlet Point Drive had been paved with one and one-half inches of asphalt, twenty feet wide. The latter finding was based on personal observation made when the trial judge viewed the location with the consent of the parties. Either finding of fact would be sufficient for the court to order defendant to complete the road to the same specifications. Therefore, even though we agree that it was improper for the court to find as fact the State specifications, that error does not affect the result as it was appropriate for the court to order the defendant to complete the road as begun.

The evidence presented to the court below was sufficient to support its crucial findings of fact. Those findings justify its conclusions of law. The judgment below is

Affirmed.

Judges PHILLIPS and MARTIN concur.

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GARY JAMES BOTTOMLEY v. LOIS SHEPHERD BOTTOMLEY

No. 8623DC15

(Filed 5 August 1986)

**1. Husband and Wife § 11.1— separation agreement—court's reduction in child support—effect**

The trial court had authority to order child support in a lesser sum than that provided for in the parties' separation agreement, but the effect of such an order was not to deprive defendant wife of her contractual right to recover the sums provided for in the agreement.

**2. Husband and Wife § 11.1— separation agreement—child support—court's reduction not supported by evidence**

The trial court's findings of fact were insufficient to support its conclusion that the parties' agreed upon amount of child support was excessive and that the sum of \$1,000 per month was "a generous and adequate amount of child support," since the court's order contained findings only as to the expenses for the child claimed in defendant wife's affidavit which the court considered excessive but contained no findings as to the child's actual past expenditures and

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**Bottomley v. Bottomley**

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present reasonable expenses, and contained findings as to the parents' incomes, but contained no findings as to their estates and present reasonable expenses so as to determine their relative ability to pay.

APPEAL by defendant from *Osborne, Judge*. Order entered 1 October 1985 in District Court, WILKES County. Heard in the Court of Appeals 8 May 1986.

Plaintiff-husband and defendant-wife separated on 21 July 1983. They entered a Separation Agreement on 6 October 1983 and were divorced on 21 August 1984.

The Separation Agreement gave defendant-wife custody of the minor child born of the marriage, subject to reasonable visitation with plaintiff-husband. It further provided that plaintiff-husband would pay to defendant-wife the sum of \$1,650 per month as support for the child. This sum represented twenty-seven percent of plaintiff-husband's then net monthly income. If his net monthly income changed, the payments were to continue in a sum equal to twenty-seven percent of his net monthly income. When this matter was heard, that sum was in excess of \$1,700 per month.<sup>1</sup>

The Separation Agreement was not incorporated into or made a part of the divorce judgment or any other court order. The parties have not heretofore been in court on the issues of child custody and support.

On 3 July 1985 plaintiff-husband filed in the District Court of Wilkes County a document captioned "Motion." While the record does not contain the parties' divorce judgment, it is apparent from the case number and the transcript that the document was filed in the parties' divorce action. The document alleged the parties' marriage, their divorce, and the birth of their minor child. It alleged "[t]hat the Court has not heretofore heard evidence and judicially determined matters involving custody, support and visitation involving the parties' minor child." It then alleged that the

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1. Both parties are executive officers at Holly Farms Poultry Industries in Wilkesboro. Plaintiff-husband has a gross income of approximately \$140,000 per year and his monthly "take-home" pay was approximately \$6,500 at the time of these hearings. Defendant-wife has a gross income of approximately \$75,000 per year and her "take-home" pay was approximately \$3,500 per month at the time of these hearings.



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**Bottomley v. Bottomley**

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parties had entered the Separation Agreement and that subsequent thereto there had been "a significant change of circumstances regarding the parties and their minor child and that it would be in the best interest of the minor child if the Court were to review this matter and enter appropriate orders regarding custody, support and visitation." The specific change of circumstances alleged was that the child was spending longer periods of time with plaintiff-husband. Plaintiff-husband prayed that he be awarded principal custody of the child and that "the Court review the matter involving child support and enter an appropriate order of support."

The trial court held two hearings and, with the consent of the parties, talked privately with the minor child. It then found that it would be in the best interest of the child that principal custody remain with defendant-wife, and it so ordered. Plaintiff-husband does not appeal from this portion of the order.

The court further found that defendant-wife had submitted monthly child support expenses totaling \$1,955, but that "such figure is excessive and is far beyond the actual needs of the child." The order specifies the items in defendant-wife's affidavit on child support expenses that the court found unnecessary or excessive. It further contains the following:

[Plaintiff-husband] is financially able to comply with the terms of the separation agreement. The Court does give some weight to the separation agreement . . . but . . . finds that the amount of child support as set in the . . . agreement is far in excess of the reasonable needs of the minor child, and although it does contribute in general to the lifestyle of the mother, the Court does not consider itself bound by the figures set in the . . . agreement, and therefore, makes its own independent determination of what is fair and reasonable child support in this case.

The Court finds that the figures submitted by the mother as reasonable expenses are not only excessive, but . . . overlook the ability of the mother to share in some part in providing support for said minor.

The Court finds in taking into consideration all of the above factors that \$1,000 per month . . . is a generous and

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**Bottomley v. Bottomley**

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adequate amount of child support, consistent with the life-style of the parties.

The court ordered plaintiff-husband to pay defendant-wife the sum of \$1,000 per month child support and to "be responsible for paying all medical or dental bills incurred by said minor child which are not covered by any insurance." Defendant-wife excepted to the foregoing findings and appeals.

*Ferree, Cunningham & Gray, P.A., by George G. Cunningham, for plaintiff appellee.*

*Vannoy & Reeves, by Jimmy D. Reeves, for defendant appellant.*

WHICHARD, Judge.

I.

"Any parent . . . having custody of a minor child, or bringing an action or proceeding for the custody of such child" may institute an action for child support. N.C. Gen. Stat. 50-13.4(a). Such an action may be maintained by motion in the cause in an action for divorce. N.C. Gen. Stat. 50-13.5(b)(5). Thus, plaintiff-husband, as a parent seeking custody in this proceeding, could seek to have his child support obligation determined through a motion in the cause in the divorce action. He was not precluded from doing so by the fact that the court had not previously entered orders in that action relating to child support.

II.

[1] Defendant-wife contends the court erred in finding that, notwithstanding the Separation Agreement, it could make "its own independent determination of what is fair and reasonable child support in this case." We disagree.

"It is settled that any separation agreement dealing with the custody and the support of the children of the parties cannot deprive the court of its inherent as well as statutory authority to protect the interests of and provide for the welfare of minors." *McKaughn v. McKaughn*, 29 N.C. App. 702, 704, 225 S.E. 2d 616, 618 (1976), citing 2 R. Lee, *North Carolina Family Law* Sec. 190 (1963). While in the usual case the custodial parent obtains an in-

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**Bottomley v. Bottomley**

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crease in the agreed-upon support, *see, e.g., Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963), this Court has upheld an order setting a lesser amount than that provided for by the applicable separation agreement. *McKaughn, supra*. The Court stated: "The judgment in this case does not change plaintiff's *contractual* obligations under the separation agreement. The question before the court was what amount it would require in the exercise of its inherent and statutory authority to provide for the welfare of minors." *Id.* at 706, 225 S.E. 2d at 619.

We find *McKaughn* controlling and hold, pursuant thereto, that the court here had authority to order child support in a lesser sum than that provided for in the parties' separation agreement. We are not persuaded by defendant-wife's argument that *McKaughn*, should be limited to its particular facts which are not present here, *viz*, "drastically changed circumstances making it impossible for the husband to comply with the separation agreement." Rather, while the court could not relieve plaintiff-husband of any contractual obligation he assumed to support his child in excess of what the law would require—*Harding v. Harding*, 29 N.C. App. 633, 639, 225 S.E. 2d 590, 594 (1976); *McKaughn, supra*—it could, "in the exercise of its inherent and statutory authority to provide for the welfare of minors," order payment of an amount either larger or smaller than that provided for in the agreement. *McKaughn*, 29 N.C. App. at 706, 225 S.E. 2d at 619. That amount should be "a reasonable subsistence, to be determined by the trial judge in the exercise of a sound judicial discretion from the evidence before him. His determination . . . will not be disturbed in the absence of a clear abuse of discretion." *Beall v. Beall*, 290 N.C. 669, 673-74, 228 S.E. 2d 407, 410 (1976).

The effect of such an order is not to deprive defendant-wife of her contractual right to recover the sums provided for in the agreement, *McKaughn, supra*, but to limit her contempt remedy to the sums provided for by the court order.

Although a court may increase or decrease its own prior award for the support of a minor child, a court cannot intervene to reduce or relieve a parent from his contractual obligations to support his child in excess of that required by law. A parent can by contract assume a greater obligation to his child than the law imposes. *Thus, if the court allows the*

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**Bottomley v. Bottomley**

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*child's [custodial parent] less money for support for [the] child than does the valid separation agreement between the child's parents, the remedy of the [custodial parent] is to sue the [non-custodial parent] for breach of contract and obtain a judgment for the difference. The [non-custodial parent's] duty under the court order may be enforced by contempt proceedings, while his [or her] contractual obligations may not be so enforced.*

3 R. Lee, *North Carolina Family Law* Sec. 229 at 139 (4th ed. 1981) (emphasis supplied).

### III.

[2] Defendant-wife further contends the court erred in finding that the agreed-upon amount of support was excessive and that the sum of \$1,000 per month "is a generous and adequate amount of child support." We hold that the portion of the order setting child support is not based on sufficient findings of fact to allow effective appellate review.

This Court has stated:

Our Supreme Court has recently reiterated the need for findings of specific fact in child support orders.

Under G.S. 50-13.4(c) . . . an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to "meet the reasonable needs of the child" and (2) the relative ability of the parties to provide that amount. These conclusions must themselves be based upon factual *findings* specific enough to indicate to the appellate court that the judge below took "due regard" of the particular "estates, earnings, conditions, [and] accustomed standard of living" of both the child and the parents . . . . It is not enough that there may be evidence in the record sufficient to support findings which could have been made.

*Coble v. Coble*, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980). Not only must the trial court hear evidence on each of the factors listed above, but the trial court must also substantiate its conclusions of law by making findings of specific

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**Bottomley v. Bottomley**

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facts on each of the listed factors. See *Steele v. Steele*, 36 N.C. App. 601, 244 S.E. 2d 466 (1978). The trial court must hear evidence and make findings of specific fact on the child's actual past expenditures and present reasonable needs to determine "the reasonable needs of the child." *Steele* at 604, 244 S.E. 2d at 469; *Daniels v. Hatcher*, 46 N.C. App. 481, 484, 265 S.E. 2d 429, 432, *disc. rev. denied*, 301 N.C. 87, --- S.E. 2d --- (1980). Further, the trial court must hear evidence and make findings of fact on the parents' income, estates . . . and present reasonable expenses to determine the parties' relative ability to pay. *Steele* at 604, 244 S.E. 2d at 469; *Daniels* at 484, 265 S.E. 2d at 432.

*Newman v. Newman*, 64 N.C. App. 125, 127-28, 306 S.E. 2d 540, 542, *disc. rev. denied*, 309 N.C. 822, 310 S.E. 2d 351 (1983). Our Supreme Court has set forth the rationale for requiring specific findings as follows:

Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

*Coble v. Coble*, 300 N.C. 708, 714, 268 S.E. 2d 185, 190 (1980).

Judged by the standard of these cases and the authorities cited therein, the order here is altogether deficient. It contains findings only as to the expenses for the child claimed in defendant-wife's affidavit which the court considered excessive. It contains no findings as to the child's actual past expenditures and present reasonable expenses. *Newman, supra*. While it contains findings as to the parents' incomes, it contains no findings as to their estates and present reasonable expenses so as to determine their relative ability to pay. *Id.* It thus "cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto." *Coble, supra*.

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**Pickrell v. Motor Convoy, Inc.**

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**IV.**

For the reasons stated, we affirm the order insofar as it finds that the trial court was not "bound by the figures set in the separation agreement, and [could make] its own independent determination of what is fair and reasonable child support in this case." The order is otherwise vacated, and the cause is remanded for entry of an appropriate order containing findings that accord with the requirements articulated in *Coble, supra*, and *Newman, supra*.

Affirmed in part, vacated in part, and remanded.

Judges WEBB and JOHNSON concur.

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CARNATION S. PICKRELL, WIDOW OF CLYDE R. PICKRELL, DECEASED,  
EMPLOYEE, PLAINTIFF v. MOTOR CONVOY, INC., EMPLOYER, TRANSPORT  
INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8620IC69

(Filed 5 August 1986)

**1. Master and Servant § 56— workers' compensation—fall by employee—no showing of causation between fall and death**

Though the evidence would support a finding that decedent fell while doing his work on his employer's premises and that such fall was an accident arising from his employment, plaintiff was nevertheless not entitled to an award of workers' compensation where there was no evidence that her husband's death proximately resulted from the fall.

**2. Master and Servant § 94.3— workers' compensation—reopening case—denial no abuse of discretion**

Where there was absolutely no showing of what additional evidence plaintiff sought to introduce or why it had not been introduced at the original workers' compensation hearing, the court could not determine on appeal either that plaintiff showed good grounds for reopening the case or that the Industrial Commission abused its discretion by declining to do so.

APPEAL by plaintiff from Opinion and Award of North Carolina Industrial Commission entered 25 September 1985. Heard in the Court of Appeals 4 June 1986.

Clyde R. Pickrell, a 57-year-old truck driver employed by defendant employer Motor Convoy, Inc., was found dead in a large

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**Pickrell v. Motor Convoy, Inc.**

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parking lot at his place of employment on 17 January 1983. His widow brought this claim for workers' compensation benefits. From an Opinion and Award denying her claim, plaintiff appeals.

*Smith, Patterson, Follin, Curtis, James & Harkavy, by J. David James, Henry N. Patterson, Jr., and Donnell Van Noppen, III for plaintiff appellant.*

*Bell, Davis & Pitt, by Walter W. Pitt, Jr. and Joseph T. Carruthers, for defendants appellees.*

MARTIN, Judge.

The material facts shown by the evidence and found by the Commission are not in dispute. Motor Convoy, Inc. operates a facility in Walkertown where new vehicles are unloaded from railroad cars, parked in a 50-acre parking lot, and then loaded onto tractor-trailer trucks and transported to their ultimate destination. Clyde Pickrell was employed as a tractor-trailer driver. His duties required him to go to defendant's office to be assigned a trip and then to locate the vehicles to be transported, drive them to the loading area, and load them onto the truck. Before loading the vehicles, drivers were required to inspect them carefully for damage which may have occurred during rail transit.

On 17 January 1983, decedent reported to work about 2:30 p.m. and was assigned a trip to Lowell and Charlotte. He left the terminal, apparently to conduct a personal errand, and returned at approximately 4:00 p.m. No one saw him again until approximately 5:45 p.m. when his body was discovered by some other drivers. Decedent was lying face upward behind a van, which was one of the vehicles which had been assigned to him for loading and transport. The van had not been moved from its parking space. Decedent was lying with his feet toward the rear of the van, and his head away from the van. His left foot was extended under the van, and his right leg was bent. There was a small amount of blood coming from one nostril and in front of his left ear. On the rear bumper of the van was a scuff mark which looked like a shoe print. The temperature was approximately 18 degrees Fahrenheit, and the wind was blowing. There was no evidence with respect to the cause of Mr. Pickrell's death.

The Deputy Commissioner denied the claim, finding the evidence sufficient to raise an inference that decedent had ac-

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**Pickrell v. Motor Convoy, Inc.**

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cidentally fallen while inspecting the van for damage, but finding that plaintiff had failed to prove that decedent died as a proximate result of injuries sustained in a fall. On appeal, the full Commission, with Commissioner Clay dissenting, modified the Deputy Commissioner's findings as follows:

4. The evidence in this case is not sufficient to raise any inference that the plaintiff suffered an accident arising out of and in the course and scope of his employment. Additionally, there is absolutely no evidence as to the cause of plaintiff's death.

The Commission concluded that decedent "did not sustain an accident arising out of and in the course of his employment . . ." and that his death "was not proven to be a proximate result of any injury arising out of the course and scope . . ." of his employment.

In order to recover compensation under the provisions of the North Carolina Workers' Compensation Act for the death of an employee, a claimant has the burden of proving that the employee's death proximately resulted from an injury by accident arising out of and in the course and scope of employment. *Gilmore v. Hoke County Board of Education*, 222 N.C. 358, 23 S.E. 2d 292 (1942). "The injury by accident must be the proximate cause, that is, an operating and efficient cause, without which death would not have occurred." *Id.* at 365, 23 S.E. 2d at 296. In order to establish the requisite causal connection between the accident and the subsequent death, the evidence must be sufficient to take the case "out of the realm of conjecture and remote possibility. . . ." *Id.*

[1] In the present case, there is no question that decedent died in the course and scope of his employment; he was on his employer's premises during working hours and was engaged in his assigned work. *Taylor v. Twin City Club*, 260 N.C. 435, 132 S.E. 2d 865 (1963). Rather, the issue in this case is whether his death proximately resulted from an injury by accident arising out of his employment.

Plaintiff first contends that the Commission erred in setting aside the Deputy Commissioner's finding that decedent had experienced an accident. It is well established that the full Commission, upon review of an award of a hearing commissioner, is not



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**Pickrell v. Motor Convoy, Inc.**

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bound by the hearing commissioner's findings of fact, but may reconsider evidence and adopt the hearing commissioner's findings or reject them and make findings of its own. *Pollard v. Krispy Waffle #1*, 63 N.C. App. 354, 304 S.E. 2d 762 (1983).

However, in this case the Commission adopted the Deputy Commissioner's first three Findings of Fact, which were essentially identical to the statement of facts summarized earlier in this opinion. In its Findings of Fact No. 4, the Commission stated that these facts were insufficient to raise any inference of accident arising from employment. Although denominated a finding of fact, this statement is actually a conclusion of law, reviewable on appeal. In our view, it is erroneous. A fall is regarded as an accident under the workers' compensation law; and if the cause of the fall is unexplained but is a natural and probable result of a risk of the employment, the law permits, though it does not compel, an inference to be drawn that the fall was an accident arising out of the employment. *Taylor, supra*; *Rewis v. New York Life Ins. Co.*, 226 N.C. 325, 38 S.E. 2d 97 (1946). The facts found by the Commission are sufficient to at least permit, though not to compel, an inference that decedent stepped up onto the bumper of the van during the course of his inspection and that he fell.

Ordinarily, the failure of the Commission to consider an inference permitted by the evidence would require remand in order that the Commission be permitted to weigh the evidence, in the light of correct legal principles, and determine the appropriate factual inferences to be drawn therefrom. See *Ammons v. Z. A. Sneed's Sons, Inc.*, 257 N.C. 785, 127 S.E. 2d 575 (1962). In this case, however, even if the Commission had drawn the permissible inference and had found, as did the Deputy Commissioner, that decedent fell and thereby sustained an accident arising out of employment, its further conclusion that plaintiff failed to establish the requisite causal connection between such accident and decedent's death would require denial of her claim. In the absence of proof of causation, the Commission is not authorized to award compensation.

Plaintiff offered no medical evidence of injury or of the cause of decedent's death; she contended before the Commission, and contends on appeal, that she is entitled to a legal presumption that decedent's death arose out of his employment and is compen-

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**Pickrell v. Motor Convoy, Inc.**

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sable. Where an employee is found dead under circumstances indicating that the employee died within the course and scope of employment, and there is no evidence as to the circumstances under which he died, it has been held that the death is "presumed" to have arisen out of the employment. 1 Larson, Workmen's Compensation Law § 10.32 (1985). The "presumption," however, is not a true presumption, nor is it applicable to prove causation in this case.

In *McGill v. Town of Lumberton*, 215 N.C. 752, 3 S.E. 2d 324 (1939), our Supreme Court held

when evidence of *violent death* is shown, [claimants] are entitled at least to the benefit of the inference of accident from which, nothing else appearing, the Commission may find, but is not compelled to find, the fact of death resulting from injury by accident, a constituent part of the condition antecedent to compensation, injury by accident arising out of and in the course of employment. In other words, this inference is sufficient to raise a *prima facie* case as to *accident only*. (Emphasis added.)

*Id.* at 754, 3 S.E. 2d at 326. Following *McGill*, this Court held, in *Harris v. Henry's Auto Parts, Inc.*, 57 N.C. App. 90, 290 S.E. 2d 716, *disc. rev. denied*, 306 N.C. 384, 294 S.E. 2d 208 (1982) that where an employee was found shot to death at his place of employment during his work hours, there was a "presumption or inference that his death arose out of the employment." *Id.* at 95, 290 S.E. 2d at 719.

Initially, we note that in the present case there is no contention that decedent's death was violent. But we do not rely on that distinction alone. There are more significant distinctions between the present case and those cited. In *McGill* and *Harris*, the *circumstances surrounding the event producing the death* were unexplained, raising an inference that the event had been an accident arising out of employment; the *cause of death*, i.e., gunshot wound, was known and there was evidence to establish a causal connection between the event inferred from the circumstances and the employee's death. Likewise, in both *Taylor v. Twin City Club*, *supra*, and *Rewis v. New York Life Ins. Co.*, *supra*, the cause of the fall was unexplained, but there was positive evidence that the fall *caused an injury which led to death*. The "unex-

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**Pickrell v. Motor Convoy, Inc.**

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plained death presumption" is really nothing more than a permissive inference which permits the trier of fact to find, in the absence of direct evidence of accident, that an unexplained injury-producing event was an accident arising out of employment. See 2 H. Brandis, *North Carolina Evidence* § 215 (2d rev. ed 1982). The inference does not extend, however, to causation, and the claimant is not relieved of the requirement of proving that the event proximately resulted in the employee's death.

In the present case, plaintiff presented evidence from which it could be inferred that decedent might have fallen the short distance from the bumper of the van to the pavement. Although there was evidence that decedent was bleeding slightly from his nose and ear, plaintiff offered no evidence to explain the significance of this fact or to indicate whether the bleeding resulted from, or preceded, the fall. No medical evidence was presented with respect to whether decedent had sustained an injury, by accident or otherwise, that could have produced his death. In the final analysis, plaintiff's evidence simply failed to address the critical issue of causation. Any finding by the Commission that death, or injury resulting in death, proximately resulted from an accident would have been based on speculation and conjecture. Thus, we agree with the Commission that plaintiff failed to sustain her burden of proving that decedent died as a proximate result of an injury by accident arising out of his employment.

[2] After her claim had been denied by the Deputy Commissioner and she had appealed to the full Commission, plaintiff filed a motion to remand the case for the taking of additional testimony. The Commission rendered its Opinion and Award without specifically addressing the motion, thereby implicitly denying it. Plaintiff assigns error, contending that the Commission's refusal to remand for further evidence amounted to an abuse of its discretion.

G.S. 97-85 provides that, upon review of an award by the full Commission, the "Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, . . . ." The question of whether to reopen a case for the taking of additional evidence is addressed to the sound discretion of the Commission, and its decision is not reviewable on appeal in the

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Woncik v. Woncik

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absence of a manifest abuse of that discretion. *Guy v. Burlington Industries*, 74 N.C. App. 685, 329 S.E. 2d 685 (1985). The party moving to reopen the case must show good grounds for the allowance of the motion. *Eaton v. Klopman Mills, Inc.*, 2 N.C. App. 363, 163 S.E. 2d 17 (1968). Moreover, Rule XXI(6), Rules of Industrial Commission (revised effective 1 January 1986, now Rule 701(g)), requires that such a motion be supported by affidavit.

In the present case, the motion states simply that the case should be remanded for the taking of additional testimony "[f]or reasons stated in a brief submitted in connection with" plaintiff's appeal to the full Commission. The record before us contains no affidavit in support of the motion, nor does it contain plaintiff's brief to the full Commission. There being absolutely no showing of what additional evidence plaintiff sought to introduce or why it had not been introduced at the original hearing, we cannot determine either that plaintiff has shown good grounds for reopening the case or that the Commission abused its discretion by declining to do so. This assignment of error is overruled.

Affirmed.

Judges PHILLIPS and PARKER concur.

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DARLENE WONCIK v. EDWARD DANIEL WONCIK

No. 8620DC119

(Filed 5 August 1986)

**1. Divorce and Alimony § 25.9— child custody—changed circumstances—credibility of parties—sufficiency of evidence**

Evidence in a child custody proceeding was sufficient to support the trial court's findings with regard to changed circumstances, though the evidence was based largely on an evaluation of the credibility of each parent.

**2. Divorce and Alimony §§ 25.7, 27.12— interference with visitation rights—effect on child's welfare—changed circumstances**

Interference with visitation of the noncustodial parent which has a negative impact on the welfare of the child can constitute a substantial change of circumstances sufficient to warrant a change of custody.

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**Woncik v. Woncik**

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**3. Divorce and Alimony § 25.7— child custody—testimony by child psychiatrist proper**

The trial court did not err in allowing a child psychiatrist to testify as an expert witness at a child custody hearing even though plaintiff argued that the psychiatrist examined the child for only about an hour on one occasion in preparation for litigation since that factor went to the weight to be given the testimony and not its admissibility, and even though plaintiff contended that the psychiatrist was asked hypothetical questions not specifically related to the child and which assumed facts not yet in evidence since the psychiatrist testified first at the hearing because of scheduling problems and the questions asked assumed facts which were later put into evidence; furthermore, plaintiff was not prejudiced since the trial judge made no reference to the psychiatrist's testimony in his order, and it could be presumed that the testimony played no role in his decision.

**4. Divorce and Alimony § 25.12— child custody—mother's alienation of child's affection for father—mother's visitation rights properly limited**

Where the trial judge had ample evidence before him to justify a conclusion that plaintiff had purposefully engaged in a course of conduct designed to alienate the child's affections for his father and that these actions were detrimental to the child's welfare, the court could properly fashion an order giving the father custody and allowing him to terminate the mother's visitation rights, pending a court hearing, should she engage in any such detrimental conduct or should she allow anyone else to do so.

APPEAL by plaintiff from *Huffman, Judge*. Orders entered 22 July and 5 September 1985 in District Court, RICHMOND County. Heard in the Court of Appeals 11 June 1986.

The parties to this appeal were married on 31 May 1975. On 3 January 1983 the parties separated, and on 22 March 1983 a consent order was entered awarding custody of the sole child of the marriage, Edward Daniel Woncik, Jr., to plaintiff-wife. At the time of the separation, both parties maintained residences in Rockingham, and the custody and visitation arrangement worked smoothly for a while. The parties thereafter were divorced. Then, plaintiff remarried and her new husband lost his job at a health spa in Rutherfordton. He got a job with a spa in Charlottesville, Virginia and he, plaintiff and the child moved there. Soon, he had lost that job, too, and they moved to Savannah, Georgia for a job at another health spa.

Meanwhile, defendant's company had transferred him to Pennsylvania, although he still often was needed in Rockingham and maintained an apartment there. These circumstances led to many problems in arranging visitation. Defendant still wanted to

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**Woncik v. Woncik**

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exercise the same visitation privileges he always had, despite the distance. He willingly juggled his schedule, paid for airline tickets and motel rooms and traveled a great deal to exercise his visitation rights.

In January 1985, defendant filed a motion in the cause seeking custody of his son. Defendant alleged that plaintiff's husband was unfit as a custodian for his son; that plaintiff and her husband had deliberately attempted to poison the child's mind against him; that plaintiff had willfully interfered with defendant's visitation rights; and that the child was being harmed by the actions of plaintiff and her husband. After contesting the jurisdiction of the North Carolina courts, and losing, plaintiff answered, denying the allegations of defendant's motion. A hearing was held on 6 May 1985 before Judge Huffman. On 22 July, Judge Huffman entered an order changing custody of the child from his mother to his father. In that order, the mother was granted the same visitation privileges the father had previously, but the order provided that those privileges would be terminated if she or her husband did or said "anything either intended to, or likely to, discredit or diminish the other party in the eyes of the child." On 5 September, defendant appeared before Judge Huffman seeking an order terminating plaintiff's visitation privileges alleging that plaintiff had refused to return the child to him after a regularly scheduled visit. Between July 22 and September 5, plaintiff had instituted a separate proceeding in Georgia seeking to enjoin removal of the child from Georgia. This proceeding was resolved against plaintiff. Judge Huffman entered an *ex parte* order terminating plaintiff's visitation privileges, pending a hearing. That hearing was held on 26 February 1986 and the visitation privileges were restored.

Plaintiff appeals both the 22 July order changing custody and the 5 September order terminating her visitation privileges.

*Howard, Howard, Morelock and From, P.A., by Robert E. Howard and John N. Hutson, Jr., for plaintiff-appellant.*

*Sharpe and Buckner by Richard G. Buckner for defendant-appellee.*

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Woncik v. Woncik

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PARKER, Judge.

In any action concerning custody of the minor children of a marriage which has ended in divorce, the courts are to give paramount consideration to the best interests of the child. G.S. 50-13.2. *See also, e.g., Wilson v. Williams*, 42 N.C. App. 348, 256 S.E. 2d 516 (1979). The trial judge is vested with broad discretion in child custody cases, and that discretion must be exercised to serve the welfare and needs of the children. *Phillips v. Choplin*, 65 N.C. App. 506, 309 S.E. 2d 716 (1983). The decision of the trial judge regarding custody will not be upset on appeal absent a clear showing of abuse of discretion, provided that the decision is based on proper findings of fact supported by competent evidence. *Comer v. Comer*, 61 N.C. App. 324, 300 S.E. 2d 457 (1983).

When the parties have entered into a consent order providing for the custody and support of their children, any modification of that order must be based upon a showing of a substantial change in circumstances affecting the welfare of the child. *Harris v. Harris*, 56 N.C. App. 122, 286 S.E. 2d 859 (1982). The party moving for the modification of custody bears the burden of showing such a change in circumstances. *Id.*

In this case, the trial judge made the following key findings of fact as to changed circumstances:

8. After plaintiff met her present husband, problems began to develop with visitation. These problems were caused by the plaintiff's actions. These actions would have frustrated the visitation except for defendant's determination to maintain a relationship with the child. These acts have had the tendency to place the child in the middle of his parents' disputes. This is not in the best interest of the child . . . .

9. After plaintiff married her present husband she began to engage in a course of conduct, along with her husband, that tended to reduce the status of the defendant in the eyes of the child . . . . These types of behavior are not in the best interest of the child.

The judge listed examples of plaintiff's actions following each finding.

[1] Plaintiff's principal challenges to these findings and to the order based thereon, is that they are unsupported by the evi-

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Woncik v. Woncik

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dence. However, as is true in most child custody cases, the determination of the evidence is based largely on an evaluation of the credibility of each parent. *See Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967). Credibility of the witnesses is for the trial judge to determine, *id.*, and findings based on competent evidence are conclusive on appeal, even if there is evidence to the contrary. *Id.* Here, each parent testified to his or her version of the events which led to the above crucial findings of fact. The fact that the trial judge believed one party's testimony over that of the other and made findings in accordance with that testimony does not provide a basis for reversal in this Court. The findings are based largely on defendant's competent, and apparently credible, testimony and are thus binding on this Court. *Blackley v. Blackley*, 285 N.C. 358, 204 S.E. 2d 678 (1974).

Plaintiff next asserts that, even if proper, the findings do not warrant the conclusion that there has been a substantial change of circumstances affecting the welfare of the child. Specifically, she contends that the trial judge was, in reality, attempting to punish her for actions interfering with visitation privileges, normally punishable by contempt of court.

Child custody cannot be used as a tool to punish an uncooperative parent. *See Lee v. Lee*, 37 N.C. App. 371, 246 S.E. 2d 49 (1978). Standing alone, such interference would normally only warrant a contempt citation. However, where, as here, such interference becomes so pervasive as to harm the child's close relationship with the noncustodial parent, there can be a conclusion drawn that the actions of the custodial parent show a disregard for the best interests of the child, warranting a change of custody.

[2] Some courts have held that interference with court-ordered visitation shows a lack of respect for judicial authority, calling into question the fitness of the custodial parent. *See, e.g., Garrett v. Garrett*, 464 S.W. 2d 74 (Mo. App. 1971). *See also* 28 A.L.R. 4th 9 (1984), and cases cited therein. Under this theory, such interference alone is enough to warrant a change of custody, even without a showing of harm to the child, provided that the parent seeking custody is a fit and proper person to have custody. We are not prepared to adopt that far-reaching position. In this case, the evidence shows both interference with visitation rights as



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Woncik v. Woncik

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well as conduct undertaken deliberately to belittle the defendant in the mind of his child. The trial court made the specific conclusion, supported by the proper findings of fact, that these actions of the plaintiff affected the welfare of the child. Because the welfare of the child is the paramount concern in custody cases, *see In re Peal*, 305 N.C. 640, 290 S.E. 2d 664 (1982), interference with visitation of the noncustodial parent which has a negative impact on the welfare of the child can constitute a substantial change of circumstances sufficient to warrant a change of custody.

[3] Plaintiff's next assignment of error is that the trial judge erred in allowing Dr. Herman Staples, a child psychiatrist, to testify as an expert witness at the custody hearing. Plaintiff argues that Dr. Staples examined Eddie Woncik for only about an hour on one occasion in preparation for litigation. However, these factors go to the weight to be given Dr. Staples' testimony, not its admissibility. Plaintiff also contends that the trial judge allowed defendant's attorney to improperly examine Dr. Staples by asking hypothetical questions not specifically related to Eddie and which assumed facts not yet in evidence. By consent of the parties, Dr. Staples testified first at the hearing because of scheduling problems. Questions were asked which assumed facts which were later put into evidence by defendant. Assuming *arguendo* that there was error, we fail to see the prejudice to plaintiff from this procedure, especially since the trial judge made no reference to Dr. Staples' testimony in his order; thus, we may presume that the testimony played no role in his decision. *See Pritchard v. Pritchard*, 45 N.C. App. 189, 262 S.E. 2d 836 (1980). The rule is that a trial judge sitting without a jury is presumed to have considered only the competent, admissible evidence and to have disregarded any inadmissible evidence that may have been admitted. *City of Statesville v. Bowles*, 278 N.C. 497, 180 S.E. 2d 111 (1971). The assignment of error is overruled.

[4] Plaintiff also assigns error to the *ex parte* order of 5 September 1985, terminating her visitation privileges pending a hearing. The hearing was held on 19 February 1986 at which time, plaintiff's visitation privileges were restored. The appeal from the 5 September order is, therefore, moot. However, plaintiff asserts that the provisions of the July custody order which empowered the judge to enter the 5 September order violate her

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**Woncik v. Woncik**

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due process rights and should be stricken from the order. The custody order provides:

Each of the parties is specifically directed not to do or say anything either intended to, or likely to, discredit or diminish the other party in the eyes of the child and each of the parties is specifically directed not to permit any other person to do or say anything in the presence or in the hearing of the minor child intended to, or likely to, discredit or diminish the other party in the eyes of the child.

Should the plaintiff engage in any such conduct, or should she permit any other person to engage in any such conduct, the defendant is directed to forthwith terminate the plaintiff's visitation privileges with the minor child and to report the matter to this Court and plaintiff's visitation privileges shall be terminated pending a hearing for the plaintiff to show why she should not be adjudged in willful contempt of this Order.

The court has wide discretion to fashion an order which will best serve the interests of the child. *In re Jones*, 62 N.C. App. 103, 302 S.E. 2d 259 (1983). While a noncustodial parent has a right to reasonable visitation, that right is limited to avoid jeopardizing the child's welfare. G.S. 50-13.5(i); *Jones, supra*. The trial judge had ample evidence before him to justify a conclusion that plaintiff had purposefully engaged in a course of conduct designed to alienate the child's affections for his father, and that these actions were detrimental to the child's welfare.

Plaintiff, relying on *In re Stancil*, 10 N.C. App. 545, 179 S.E. 2d 844 (1971), further argues that the order is an impermissible delegation of judicial authority. The order under scrutiny in this case is, in our view, distinguishable from that in *Stancil* for the reason that the trial judge in *Stancil* left the time and length of visitation in the discretion of the custodial grandmother. In the instant case, the order is specific as to the time and duration of the noncustodial parent's visitations. The provision directing termination of the visitation privilege, pending a court hearing, applies only on the happening of a certain condition and is designed to prevent a situation detrimental to the child's welfare from becoming more harmful before a court hearing can be scheduled. The judge did not abuse his discretion in fashioning an order

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**Atlantic Ins. & Realty Co. v. Davidson**

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designed to prevent further harm to the child from this type behavior. The assignment of error is overruled.

The order appealed from is

Affirmed.

Judges ARNOLD and EAGLES concur.

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ATLANTIC INSURANCE & REALTY COMPANY v. IDA MAE DAVIDSON

No. 8618DC45

(Filed 5 August 1986)

**Appeal and Error § 19— appeal as pauper denied—no abuse of discretion**

The trial court did not abuse its discretion in refusing to allow petitioner to appeal as a pauper from the magistrate to the district court when her affidavit showed she owned a home worth \$27,150.

Judge WHICHARD concurring in the result.

Judge JOHNSON dissenting.

APPEAL by petitioner from *Bencini, Judge*. Order entered 11 October 1985 in District Court, GUILFORD County. Heard in the Court of Appeals 3 June 1986.

The petitioner appeals from an order of the District Court of Guilford County which denied her the right to appeal from a magistrate to the district court in forma pauperis. On 1 October 1985 a magistrate entered a judgment in favor of the plaintiff against the defendant petitioner for \$47.00 plus court costs. She filed a petition to sue as a pauper in the district court. The affidavit in support of this petition showed that she owned a house and lot with a tax value of \$27,150.00. The assistant clerk of the superior court filed an order in which she concluded, "[i]n view of the Affidavit and Certification appearing above, it is ordered that the individual petitioner in the above entitled action is not authorized to bring suit in this action [a]s a pauper." Judge Bencini in an order made the same conclusion and recited "[petitioner] owns a home worth \$27,150.00 or more and has personal property that is unencumbered."

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Atlantic Ins. & Realty Co. v. Davidson

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The petitioner appealed.

*No brief filed by plaintiff appellee.*

*Central Carolina Legal Services, Inc., by Stanley B. Sprague,  
for petitioner appellant.*

WEBB, Judge.

The question posed by this appeal is whether it was error not to allow the petitioner to appeal as a pauper from the magistrate to the district court. G.S. 1-110 provides for a person to bring an action in the district court as a pauper but does not provide for an appeal from a magistrate as a pauper. G.S. 1-288 provides for an appeal as a pauper from the district and superior courts but does not provide for an appeal from a magistrate to the district court.

If a defendant against whom a magistrate has rendered a judgment may appeal as a pauper it is within the discretion of the judge as to whether it shall be allowed. *See In re McCarroll*, 313 N.C. 315, 327 S.E. 2d 880 (1985). We cannot hold the court abused its discretion by not allowing the petitioner to appeal as a pauper when her affidavit showed she owned a home worth \$27,150.00.

We do not believe our decision in this case violates the constitutional requirements enunciated in *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971) upon which the petitioner relies. That case holds it is a violation of due process to deprive a person of the right to file a divorce action if the person cannot pay the court costs. In this case there is evidence that the petitioner had the means to pay for the costs of the appeal. *Adkins v. E. I. Dupont de Nemours & Co.*, 335 U.S. 331, 69 S.Ct. 85, 93 L.Ed. 43 (1948) deals with the interpretation of a federal statute in regard to appeals. It is not applicable to this case. The petitioner also relies on cases from other jurisdictions which are not binding upon us.

Affirmed.

Judge WHICHARD concurs in the result.

Judge JOHNSON dissents.

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Atlantic Ins. & Realty Co. v. Davidson

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Judge WHICHARD concurring in the result.

I concur in the result reached. I believe, however, that in the absence of any express statutory authorization for proceeding as a pauper when appealing to district court from an adverse ruling by a magistrate, we must hold that the trial court was not permitted to consider defendant's petition "to sue as" a pauper.

N.C. Gen. Stat. 1-110 provides that a court "may authorize a person *to sue* as a pauper . . . ." (Emphasis supplied.) This language is clear and unambiguous and therefore must be construed as written. See *State v. Wiggins*, 272 N.C. 147, 153-54, 158 S.E. 2d 37, 42-43 (1967), *cert. denied*, 390 U.S. 1028, 88 S.Ct. 1418, 20 L.Ed. 2d 285 (1968). It cannot be construed to permit a trial judge or clerk to authorize an *appeal* as a pauper to district court from an adverse judgment rendered in magistrate's court.

N.C. Gen. Stat. 1-288 provides for appeals as a pauper from superior or district court to the Appellate Division. Like N.C. Gen. Stat. 1-110, N.C. Gen. Stat. 1-288 requires submission of an affidavit of indigency. Unlike N.C. Gen. Stat. 1-110, however, N.C. Gen. Stat. 1-288 also requires that "[t]he affidavit must be accompanied by a written statement from a practicing attorney . . . that he has examined the . . . case, and is of the opinion that the decision of the Court . . . is contrary to law." As with N.C. Gen. Stat. 1-110, N.C. Gen. Stat. 1-288 cannot be construed to permit an appeal in this instance.

For whatever reasons, our legislature has failed to enact statutory provisions similar to those in N.C. Gen. Stat. 1-288 for appeals to district court from an adverse ruling rendered in magistrate's court. Further, N.C. Gen. Stat. 1-288 greatly circumscribes the availability of pauper status for appeals to this Court by requiring a written assertion by an attorney that there has been an error of law. Before reaching the question of whether the court properly exercised its discretion, we would first have to resolve 1) whether persons in defendant's situation may ever proceed as paupers when appealing to district court from magistrate's court, and 2) if they can, whether the availability of pauper status for such appeals should be limited in a manner similar to the requirements of N.C. Gen. Stat. 1-288 or otherwise. These are policy questions for the legislature.

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**Atlantic Ins. & Realty Co. v. Davidson**

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I thus would not reach the question of whether the court abused its discretion by not allowing petitioner to appeal as a pauper. If that question should be reached, in my view it is impossible to ascertain from this record whether the court in fact exercised its discretion or whether it ruled as a matter of law, based on petitioner's ownership of her home, that she could not appeal. Accordingly, if the court had discretion to allow the appeal, and I do not believe it did, I would remand for findings establishing that it in fact exercised its discretion.

The constitutionality of this state of the law was not raised and considered in the trial court, and we thus should not pass upon it here. *Powe v. Odell*, 312 N.C. 410, 416, 322 S.E. 2d 762, 765 (1984); *White v. Pate*, 308 N.C. 759, 765, 304 S.E. 2d 199, 203 (1983); *Brice v. Moore*, 30 N.C. App. 365, 368, 226 S.E. 2d 882, 884 (1976).

Judge JOHNSON dissenting.

I respectfully dissent from the majority opinion for the following reasons. First of all, it is not clear to me from the "Order" the basis upon which the trial court exercised its discretion and denied petitioner's appeal as a pauper. Said "Order" is merely a handwritten statement "defendant owns a home worth \$27,150.00 or more and has personal property that is unencumbered." There are no findings with respect to petitioner's sworn affidavit whereby she states that she is 65 years of age and unable to work due to high blood pressure and a heart condition; that her sole source of income is a \$220.00 per month social security check and a monthly \$120.00 SSI check; that her monthly expenses total \$362.00 per month; that her money runs out about the 20th of each month whereupon she subsists on leftover crackers, bread and beans until her next month's check arrives. I do not believe the absence of findings regarding petitioner's ability to finance her appeal complies with *In re McCarroll*, 313 N.C. 315, 327 S.E. 2d 880 (1985). Secondly, the majority opinion makes much of the fact that G.S. 1-110 and G.S. 1-288 do not specifically provide for an appeal in forma pauperis from a magistrate to the district court. I think it would be anomalous for the General Assembly to provide for a person to bring an action in the district court, G.S. 1-110, and provide for a pauper to appeal from district court to superior court, G.S. 1-288, but not allow for a pauper to appeal

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Vuncannon v. Vuncannon

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from an adverse judgment rendered in magistrate's court. Moreover, I believe G.S. 6-24 expresses the General Assembly's intent to allow for such an appeal by a pauper.

Lastly, I remain unconvinced that *Boddie v. Connecticut*, 401 U.S. 371, 28 L.Ed. 2d 113, 91 S.Ct. 780 (1971), allows for such a troublesome result as in the case *sub judice*. Moreover, while *Adkins v. E. I. Dupont de Nemours & Co.*, 335 U.S. 331, 93 L.Ed. 43, 69 S.Ct. 85 (1948), did interpret a Federal Statute, I agree with the sentiments expressed by the Court and would not require a person to be completely destitute to appeal in forma pauperis from magistrate's court to district court.

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JEANETTE MARIE VUNCANNON v. KEITH W. VUNCANNON, JR.

No. 8519DC960

(Filed 5 August 1986)

**Divorce and Alimony § 25.7— child custody—false testimony by child—no modification of order on basis of fraud**

The trial court did not abuse its discretion by failing to modify a previous child custody order based upon plaintiff's allegations of fraud, though one of the parties' children who testified for defendant in the earlier hearing stated that she had sworn falsely at the prior hearing and had previously lied to the court, since the trial judge was in the best position to determine what effect, if any, the witness's discrepancies in her testimony had on his previous custody award; the credibility of the witness was for the trial judge to weigh; and plaintiff failed to show any abuse of discretion in the denial of her motion to have the previous order awarding custody to defendant set aside and in the court's decision to place custody of one child with plaintiff and to retain custody of the other child in defendant.

APPEAL by plaintiff from *Hammond, Judge*. Order entered 21 June 1985 in District Court, RANDOLPH County. Heard in the Court of Appeals 10 February 1986.

The parties herein were married on 12 January 1971, and had two children, Jacqueline Vuncannon, born 31 October 1968, and Anthony Vuncannon, born 12 April 1972. On 10 April 1985, plaintiff filed a complaint seeking custody of the minor children. Defendant answered and counterclaimed and prayed that he be awarded custody of the children. The matter was heard at the 22

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**Vuncannon v. Vuncannon**

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April 1985 non-jury session before the Honorable L. T. Hammond, Jr., who entered an Order awarding custody of both children to defendant.

On 2 May 1985, plaintiff moved pursuant to G.S. 1A-1, Rule 60(b)(3) to have the April Order set aside because the Order was based on perjured testimony suborned by defendant. Attached to this motion was an Affidavit, executed by Jacqueline Vuncannon, which in pertinent part provided:

4. That the affiant testified as a witness for her father the defendant, Keith W. Vuncannon, Jr.

5. That the affiant swore falsely when she took an oath to testify in that action as a witness for her father.

6. That on 28 March, 1985 the affiant appeared before Frances S. Stilwell, a Magistrate in the Magistrate's Office in the Administrative Building in the County of Randolph, and that she also swore falsely before the Magistrate Frances S. Stilwell.

7. That the specific times that she swore falsely are as follows: (a) She swore that the defendant her father had never shown her pornographic movies or pornographic video cassettes on the television screen, when, in fact, he had shown the affiant pornographic scenes of video cassette movies on the television screen; (b) She swore that her father the defendant had never been naked in her presence, when in fact, he has been naked in her presence many times within the past two years and prior to that; (c) That she swore that her mother, the plaintiff Jeanette Marie Vuncannon, knocked her to the floor and pulled her hair on 28 March, 1985, both before Judge Hammond and before Frances S. Stilwell, when in fact, her mother did neither of these two things on that date; (d) The affiant swore that she had never seen the defendant her father beat and assault her mother the plaintiff when, in fact, she has been an eyewitness to two beatings within the past three years and she has seen others prior to three years ago.

8. That the defendant affiant's father told the affiant that unless she falsely testified at the hearing, in order for him to win the case, he would take her brother Tony away



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**Vuncannon v. Vuncannon**

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and the affiant would never see Tony again. The defendant further threatened the affiant by telling her unless she falsely testified in the defendant's favor and if the plaintiff her mother won the case, he the defendant would hire someone to kill the affiant's mother and that he had read books that showed him the way to dispose of her body so that no one would ever know who did it.

9. That the affiant realizes that she has done wrong and realizes the consequences of swearing falsely on material issues in Court, and that one of the reasons she did it was because her father the defendant, Keith W. Vuncannon, Jr., promised her Three Thousand and 00/100 (\$3,000.00) Dollars if she would testify falsely as she did against the plaintiff her mother.

On 31 May 1985, defendant filed a "motion in the cause and answer to motion" in which he "denie[d] having suborned the perjured testimony of his 16-year-old daughter at the trial of this matter on April 22, 1985" and specifically denied the averments contained in Jacqueline's affidavit. Defendant requested that the previous Order be reviewed in light of the changed circumstances that Jacqueline "apparently does not wish to reside with the defendant."

The matter came on for hearing on 11 June 1985 before Judge Hammond, who made the following pertinent findings of fact:

6. Since the entry of this Court's Order on April 22, 1985, the minor child, Jacqueline Vuncannon, has commenced living with her mother, the plaintiff, and the child testified at this hearing that she wished to continue to reside with the plaintiff.

7. Jacqueline Vuncannon testified in support of the plaintiff's Motion and was plaintiff's only witness. Jacqueline Vuncannon testified that she had committed perjury during this Court's hearing on April 22, 1985; however, the Court after hearing the evidence, finds that her testimony was virtually identical to the testimony offered by her at the hearing conducted on April 22, 1985. From the evidence presented, it is clear to the Court that Jacqueline Vuncannon was not entire-

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**Vuncannon v. Vuncannon**

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ly truthful when testifying in support of the plaintiff's Motion. The Court further concludes from the evidence presented that any discrepancies in the testimony offered by Jacqueline Vuncannon on April 22, 1985 and June 11, 1985 are not sufficient to effect [sic] this Court's decision concerning custody and visitation rendered on April 22, 1985.

The court thereafter on June 21, 1985 signed an Order which (i) denied plaintiff's motion to set aside the April Order, (ii) awarded primary custody of Jacqueline to plaintiff and (iii) granted plaintiff specific visitation rights with Anthony Vuncannon. From this Order, plaintiff appealed.

*Ottway Burton, P.A., by Ottway Burton for plaintiff-appellant.*

*No brief for defendant-appellee.*

PARKER, Judge.

Plaintiff's first assignment of error is deemed abandoned because "[q]uestions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned." N.C. R. App. Proc. 28(a).

The only questions properly before this Court are whether the trial court erred in finding that the 22 April 1985 Order was not based on perjured testimony procured by the defendant and in modifying the 22 April 1985 Order.

Plaintiff's contention is that because she alleged in her motion that defendant suborned the perjured testimony of his daughter at the trial, that she is entitled to have that Order set aside pursuant to G.S. 1A-1, Rule 60(b)(3) on account of "a fraud practiced upon the court." The rule is well-established that a motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion. *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975); *In the Matter of Oxford Plastics v. Goodson, Jr.*, 74 N.C. App. 256, 328 S.E. 2d 7 (1985); Wright and Miller, *Federal Practice and Procedure* (Civil) § 2857 (1973) and 7 *Moore's Federal Practice* 2d § 60.24[5]. Plaintiff advances no argument that the court abused its discretion in denying this motion, and our review of the record reveals no such abuse.

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**Vuncannon v. Vuncannon**

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Defendant filed a motion in the cause in which he asked the court to review the previous Order in light of the fact that Jacqueline wished to reside with plaintiff. This motion, in conjunction with plaintiff's motion to have the previous Order set aside, raised the issue of "changed circumstances" as required by G.S. 50-13.7.

Judge Hammond, who originally heard this matter and entered the April custody Order, was also the judge who jointly heard plaintiff's motion to set aside the previous Order and defendant's motion in the cause. He alone was in the unique position of determining whether, in fact, there had been fraud under Rule 60(b)(3). Although he found that Jacqueline "was not entirely truthful when testifying in support of plaintiff's Motion . . ." he also found that any discrepancies between Jacqueline's testimony were "not sufficient to effect [sic] this Court's decision concerning custody . . . rendered on April 22, 1985." Judge Hammond clearly found that the discrepancies in Jacqueline's testimony did not amount to "fraud . . . misrepresentation, or other misconduct of an adverse party."

The trial court's findings of fact modifying a child custody Order are conclusive on appeal if supported by competent evidence, *Daniels v. Hatcher*, 46 N.C. App. 481, 265 S.E. 2d 429, *disc. rev. denied*, 301 N.C. 87 (1980), even though there is evidence to the contrary. *In re Williamson*, 32 N.C. App. 616, 233 S.E. 2d 677 (1977). If the evidence supports the findings of fact and those findings of fact form a valid basis for the conclusions of law, the judgment will not be disturbed on appeal, *Paschall v. Paschall*, 21 N.C. App. 120, 203 S.E. 2d 337 (1974), absent a clear showing of an abuse of discretion. *Hensley v. Hensley*, 21 N.C. App. 306, 204 S.E. 2d 228 (1974).

Applying these principles, we are unable to say the court herein abused its discretion by failing to modify the previous custody Order and to place custody of Anthony with plaintiff based upon plaintiff's allegations of fraud. Although Jacqueline stated in her affidavit that she "swore falsely" at the prior hearing, and testified at the June hearing that she had previously lied to the court, her characterization of her previous representations are not necessarily controlling. Our review of her testimony at the June hearing does reveal certain discrepancies between that

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**Woodruff v. Shuford**

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and the averments in her affidavit. However, no transcription was taken of the April hearing, and this Court is in no position to compare Jacqueline's original testimony, her affidavit, and her subsequent testimony. In a custody proceeding, the credibility of witnesses is for the trial judge to weigh. Judge Hammond was in the best position to determine what effect, if any, these discrepancies had on his previous custody award, and plaintiff has wholly failed to show any abuse of discretion in the denial of her motion to have the previous Order set aside and in the court's decision to place custody of Jacqueline with her and to retain custody of Anthony in defendant.

The Order appealed from is

Affirmed.

Chief Judge HEDRICK and Judge WEBB concur.

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HOWARD WOODRUFF v. ROBERT L. SHUFORD, III

No. 8625SC159

(Filed 5 August 1986)

**1. Accounts § 2— payment for renovation work—account stated—sufficiency of evidence**

In an action to recover an amount due for renovation work on defendant's property, the trial court did not err in denying defendant's motion for a directed verdict where plaintiff's evidence showed that he submitted a written statement to defendant for materials and labor, together with invoices for the materials, in March 1982; approximately two weeks later plaintiff spoke with defendant by phone and defendant said that he "would be up here within two weeks and pay the bill"; defendant did not thereafter pay plaintiff; other than his promise to pay within two weeks, defendant never mentioned the bill until plaintiff instituted this action in September 1982; and this evidence was sufficient for the jury to find an account stated.

**2. Accounts § 1— failure to instruct on open account—no error**

Failure to instruct on an open account did not harm defendant since his liability was established on an account stated, and this liability superseded any liability on an open account.

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**Woodruff v. Shuford**

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APPEAL by defendant from *Saunders, Judge*. Judgment entered 27 August 1985 in Superior Court, CALDWELL County. Heard in the Court of Appeals 11 June 1986.

Plaintiff's evidence tended to show, in pertinent part, that:

In 1979 defendant entered an oral agreement with plaintiff for construction and renovation work on defendant's property. The parties agreed that plaintiff would be paid on an hourly basis and reimbursed for the cost of materials. The parties further agreed that "[w]hen the amount of 5 thousand dollars labor and material had been reached [defendant] was to make the payment."

Defendant presumably made this payment, and the parties thereafter entered "into another arrangement to do some further work [under which plaintiff would] bill [defendant] for the labor at four dollars per hour and the material at [plaintiff's] cost." In March 1982 plaintiff submitted a written statement for material and labor, together with copies of invoices, to defendant. Two weeks later defendant told plaintiff during a phone conversation that he "would be up here within two weeks and pay the bill" and that he would return the bill and the copies of the invoices at that time. Thereafter defendant returned the bill and invoices and said he "would have the money rounded up within two weeks." However, defendant never paid the amount owed, and plaintiff brought this action seeking collection of this debt.

Plaintiff introduced and the court admitted into evidence the written statement for labor and materials. The court submitted the following issue to the jury: "Was the account between [plaintiff] and [defendant] an account stated?" The jury answered in the affirmative and the court entered a judgment for plaintiff in the amount of "\$11,891.35 with interest thereon from March 14, 1982."

Defendant appeals.

*Wilson and Palmer, P.A., by William C. Palmer, for plaintiff appellee.*

*Rudisill & Brackett, P.A., by J. Steven Brackett, for defendant appellant.*

WHICHARD, Judge.

[1] Defendant contends the court erred in failing to grant his motion for a directed verdict. We disagree.

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**Woodruff v. Shuford**

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In general,

[i]n considering any motion for directed verdict [under N.C. Gen. Stat. 1A-1, Rule 50], the trial court must view all the evidence that supports the non-movant's claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant's favor.

*Bryant v. Nationwide Mutual Fire Insurance*, 313 N.C. 362, 369, 329 S.E. 2d 333, 337-38 (1985). The court may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. *Dickinson v. Pake*, 284 N.C. 576, 583, 201 S.E. 2d 897, 902 (1974).

To establish an account stated plaintiff was required to show:

(1) a calculation of the balance due; (2) submission of a statement to plaintiff; (3) acknowledgment of the correctness of that statement by plaintiff; and (4) a promise, express or implied, by plaintiff to pay the balance due.

*Carroll v. Industries, Inc.*, 296 N.C. 205, 209, 250 S.E. 2d 60, 62 (1978). Further,

[t]he jury may infer from the retention without objection of an account rendered for a reasonable time by the person receiving a statement of account that the person receiving the statement has agreed that the account is correct. . . . The retention by the defendant of the account did not of itself create a cause of action. It is a jury question as to whether the defendant by the retention of the statement of the account agreed that it was correct and agreed to pay it. In determining whether the defendant's failure to object to the account was an assent by the defendant to its correctness and an agreement to pay it, the jury may consider several things. Among the things to be considered are the nature of the transaction; the relation of the parties; their distance from each other, and the means of communication between them; their business capacity; their intelligence or want of intelligence; and the usual course of business between them. [Citations omitted.]

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**Woodruff v. Shuford**

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*Mahaffey v. Sodero*, 38 N.C. App. 349, 351, 247 S.E. 2d 772, 774 (1978).

Plaintiff's evidence here shows that he submitted a written statement to defendant for materials and labor, together with invoices for the materials, in March 1982. Approximately two weeks later plaintiff spoke with defendant by phone and defendant said that he "would be up here within two weeks and pay the bill." Defendant did not thereafter pay plaintiff, and, other than his promise to pay within two weeks, defendant never mentioned the bill until plaintiff instituted this action in September 1982.

We hold that the foregoing evidence, when considered in the light most favorable to plaintiff, is not insufficient as a matter of law to justify a verdict for plaintiff. *Dickinson, supra*, 284 N.C. at 583, 201 S.E. 2d at 902. From plaintiff's preparation of the statement for labor and materials together with invoices, the jury could reasonably infer that there was a calculation of the balance due. Plaintiff submitted the statement to defendant. The jury could reasonably infer an acknowledgment of the correctness of that statement by defendant's failure to object to the account within a reasonable time. Defendant expressly promised to pay the bill, and the jury could reasonably infer that he was promising to pay the stated balance due. Thus, following *Carroll, supra*, and *Mahaffey, supra*, plaintiff has produced sufficient evidence to create a jury question as to whether there was an account stated. Accordingly, the court did not err in denying defendant's motion for a directed verdict.

[2] Defendant contends the court should have submitted an issue based on the theory of an open account. Assuming, *arguendo*, that there was sufficient evidence to justify an instruction on an open account, we hold that the failure to give such an instruction was not prejudicial since the evidence supported, and the jury found, an account stated.

In general, a trial court "must submit all issues which are necessary to settle the material controversies arising out of the pleadings." *Winston-Salem Joint Venture v. City of Winston-Salem*, 65 N.C. App. 532, 537, 310 S.E. 2d 58, 62 (1983). An open account results where the parties intend that the transactions between them are to be considered as a connected series rather than as independent of each other, a balance is kept by adjust-

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**Woodruff v. Shuford**

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ment of debits and credits, and further dealings between the parties are contemplated. *Noland Co. v. Poovey*, 54 N.C. App. 695, 707, 282 S.E. 2d 813, 821 (1981). An account stated supersedes an open account, and thus the jury only could have found one or the other if instructed on both. *See Teer Co. v. Dickerson Inc.*, 257 N.C. 522, 530, 126 S.E. 2d 500, 506 (1962) (once an agreement as to the amount of balance is reached, the account stated constitutes a new and independent cause of action, superseding and merging the antecedent causes of action represented by the particular constituent items). *See also Mahaffey, supra*, 38 N.C. App. at 351, 247 S.E. 2d at 774. *See generally* 1 Am. Jur. 2d *Accounts and Accounting* Sec. 21 at 395 ("When the parties to an open account reach an agreement with respect to the totality of the transactions between them, the new transaction is called a 'statement' of the account, and the situation between the parties is called an 'account stated' . . ."). Any open account that may have existed between the parties thus merged into and was superseded by the account stated. Accordingly, the failure to instruct on an open account did not harm defendant since his liability was established, in any event, on an account stated, and this liability superseded any liability on an open account. *See Paris v. Kreitz*, 75 N.C. App. 365, 377, 331 S.E. 2d 234, 243, *disc. rev. denied*, 315 N.C. 185, 337 S.E. 2d 858 (1985) (even if court erred by refusing to submit the issue of punitive damages, this error did not harm plaintiffs because there was no tortious conduct to which their claim for punitive damages could attach). *Cf. Noland Co., supra*, 54 N.C. App. at 706-07, 282 S.E. 2d at 821.

Defendant contends the court erred by denying his motion for a new trial based upon jury argument by plaintiff's counsel. We disagree.

Defendant informed the trial court that plaintiff's counsel had made the following (unrecorded) argument to the jury:

That the plaintiff does not contend that the plaintiff and the defendant did not meet in August of 1982 on the property of [defendant] to discuss objections that [defendant] had to the bill, however, the plaintiff does say that this conversation took place after the lawsuit in this case was filed in July of 1982.

He contended at trial, and contends here, that this argument was not based upon the record. However, he has not shown any



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**Forsyth Co. Hospital Authority, Inc. v. Sales**

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prejudice from the argument, even assuming that it was not based on the record. Accordingly, we hold that the court did not abuse its discretion by denying the motion for a new trial. *See Henderson v. Provident Life and Accident Ins. Co.*, 62 N.C. App. 476, 481, 303 S.E. 2d 211, 214 (1983) (ruling on motion for new trial reviewable only for abuse of discretion).

No error.

Judges PHILLIPS and MARTIN concur.

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FORSYTH COUNTY HOSPITAL AUTHORITY, INC., PLAINTIFF-APPELLEE v.  
ETHEL SALES AND JESSIE LYNCH, DEFENDANT-APPELLANTS

No. 8621DC304

(Filed 5 August 1986)

**Contracts § 27.1; Guaranty § 1—hospital patient—liability to pay for services—patient admitted by sister—sister liable on guaranty agreement**

The law implied a contract whereby defendant patient was primarily liable to plaintiff hospital for the reasonable value of the services rendered on her behalf, and defendant sister of the patient was secondarily liable pursuant to the express provisions of the guaranty agreement she signed.

APPEAL by defendant Jessie Lynch from *Gatto, Judge*. Judgment entered 9 December 1985 in District Court, FORSYTH County. Heard in the Court of Appeals 12 June 1986.

Plaintiff hospital instituted this action for unpaid hospital services in the amount of \$7,977.25, rendered to defendant Jessie Lynch, plus interest and costs. Defendant Jessie Lynch answered, admitting that plaintiff hospital had provided her with medical services but denying that she had agreed to pay plaintiff. Defendant Lynch alleged as a defense that she cannot be held liable under a theory of an implied contract for the unpaid balance because her sister defendant Ethel Sales was obligated to pay, having signed an express contract with plaintiff to pay for the hospital services. On 22 November 1985, plaintiff moved for summary judgment against defendant Lynch. Plaintiff's motion was supported by the affidavit of Gary Barringer, Credit and Col-

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Forsyth Co. Hospital Authority, Inc. v. Sales

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lections Manager of plaintiff, which incorporated by reference two exhibits, to wit: a true copy of 26 February 1982 admission form and a copy of the hospital bill for \$7,977.25. On 9 December 1985, the court granted plaintiff's motion for summary judgment against defendant Lynch. Defendant Jessie Lynch appeals.

*Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr. and Joan M. Healy, for plaintiff appellee.*

*Legal Aid Society of Northwest North Carolina, Inc., by Susan Gottsegen, for defendant appellant.*

JOHNSON, Judge.

On 26 February 1982, defendant Jessie Lynch was admitted for hospitalization at Forsyth Memorial Hospital. Mrs. Lynch received the care and services rendered by the hospital until her discharge over thirty (30) days later on 29 March 1982. The total bill during her hospitalization amounted to \$7,977.25. Defendant Ethel Sales, sister of defendant Jessie Lynch, signed Mrs. Lynch's admission form, including the section thereunder entitled "Financial Responsibility."

On one hand, when a physician renders professional services, the law implies a promise on the part of the patient who received the benefit of the services to pay what the services are reasonably worth, absent an agreement that the services were rendered gratuitously. *Prince v. McRae*, 84 N.C. 674 (1881); 10 Williston On Contracts sec. 1286A (3d ed. 1967). Failure to agree on the amount of compensation entitles the physician to the reasonable value of his services, even where he ministers treatment to a person incapable of mutuality of assent. 10 Williston On Contracts, *supra*, at sec. 1286. On the other hand, when there is an express contract creating primary liability for the furnishing of services to a third person, the law will not imply a contract to the third person, even though it is the third person who received the benefits of the services. *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 124 S.E. 2d 905 (1962); *Ranlo Supply Co. v. Clark*, 247 N.C. 762, 102 S.E. 2d 257 (1958). Hence, the determinative issue in this case is whether the statement of "Financial Responsibility" constitutes a guaranty, creating a secondary liability rather than a primary liability.

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Forsyth Co. Hospital Authority, Inc. v. Sales

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A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in the case of the failure of another person who is liable in the first instance for such payment or performance. *Cowan v. Roberts*, 134 N.C. 415, 46 S.E. 979 (1904). The guaranty creates an obligation that is independent of the obligation of the principal debtor. *Gillespie v. DeWitt*, 53 N.C. App. 252, 258, 280 S.E. 2d 736, 741, *disc. rev. denied*, 304 N.C. 390, 285 S.E. 2d 832 (1981). A guaranty is a collateral and independent undertaking creating a secondary liability. *SNML Corp. v. Bank of North Carolina*, 41 N.C. App. 28, 36, 254 S.E. 2d 274, 279 (1979). The creditor's cause of action against the guarantor ripens immediately upon the failure of the principal debtor to pay the debt at maturity. *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 195, 188 S.E. 2d 342, 345 (1972). A guaranty of collection is distinguished from a guaranty of payment in that the former is a promise by the guarantor to pay the debt only on the condition that the creditor first diligently prosecute the principal debtor without success. *EAC Credit Corp. v. Wilson*, 281 N.C. 140, 145, 187 S.E. 2d 752, 755 (1972).

In *Gillespie v. DeWitt*, *supra*, the agreement at issue provided:

We hereby jointly and severally *guarantee* the full and prompt *payment* to said Bank at maturity, and at all times thereafter, and also at the time hereinafter provided, of any and all indebtedness, liabilities and obligations of every nature and kind of said Debtor to said Bank, and every balance and part thereof, whether now owing or due, or which may hereafter, from time to time, be owing or due, and howsoever heretofore or hereafter created or arising or evidenced, to the extent of \$30,000.

*Gillespie v. DeWitt*, *supra*, at 259, 280 S.E. 2d at 741 (emphasis added). This Court held that the above language was "sufficient to create a guaranty of payment." *Id.*

The pertinent section of Forsyth Memorial Hospital's admission form provides:

FINANCIAL RESPONSIBILITY

The undersigned, in consideration of hospital services being rendered or to be rendered by Forsyth County Hospital Au-

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**Forsyth Co. Hospital Authority, Inc. v. Sales**

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thority, Inc. in Winston-Salem, N.C. to the above patient, does hereby *guarantee payment* to Forsyth County Hospital Authority, Inc. on demand all charges for said services and incidentals incurred on behalf of such patient.

(Emphasis added.)

Although the section is entitled "Financial Responsibility," while the pertinent section in *Gillespie v. DeWitt, supra*, was entitled "Loan Guaranty Agreement," the title is not necessarily binding. The substance of the transaction controls. *Thompson v. Soles*, 299 N.C. 484, 263 S.E. 2d 599 (1980). The agreement signed by defendant Ethel Sales expressly "guarantee[s] payment," as did the guaranty agreement in *Gillespie v. DeWitt, supra*. Neither the agreement at issue nor the agreement in *Gillespie v. DeWitt, supra*, expressly condition such payment on the failure of the principal debtor to pay. The agreement signed by defendant Ethel Sales was sufficient to create a guaranty of payment.

The rule expressed in *Vetco Concrete Co. v. Troy Lumber Co., supra*, that there can be no implied contract when there is an express contract regarding the same subject matter, does not apply when the express contract creates a secondary obligation. A primary obligation can be implied when a secondary obligation, or guaranty, is expressly provided.

A guaranty in its technical and legal sense has relation to some other contract or obligation with reference to which it is a collateral undertaking; it is a secondary and not a primary obligation. A guaranty can exist only where there is some principal or substantive liability to which it is collateral; if there is no primary liability on the part of the third person, *either express or implied*, that is, if there is no debt, default, or miscarriage, present or prospective, there is nothing to guarantee and hence there can be no contract of guaranty.

38 C.J.S. *Guaranty* sec. 2 (1943) (emphasis added).

We find that the holding in *Prince v. McRae, supra*, whereby the law implies a promise on the part of the patient to pay the physician applies equally to hospitals as health care providers. In conclusion, in the case *sub judice*, the law implies a contract whereby defendant Jessie Lynch is primarily liable to the hospi-

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**Forsyth Co. Hospital Authority, Inc. v. Sales**

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tal for the reasonable value of the services rendered on her behalf. Defendant Sales is secondarily liable pursuant to the express provisions of the guaranty agreement she signed. The court was correct in holding that plaintiff is entitled to judgment against defendant Jessie Lynch as a matter of law.

In defendant Jessie Lynch's second argument presented in her brief, she contends that the court erred in granting summary judgment for plaintiff "when the evidence offered was inadmissible." Specifically, defendant objects to the evidence on the grounds that the copy of defendant Lynch's hospital bill, accompanied by the affidavit of Gary Barringer, Credit and Collections Manager of plaintiff hospital, "[does] not meet the requirements of a business record" and is "not sufficiently itemized" so as to constitute an "itemized statement of account" within the meaning of G.S. 8-45.

Absent some exceptional situation not present in the case at bar, error may not be predicated upon the admission of evidence unless a timely objection or motion to strike appears of record. Rule 103(a), N.C. Rules Evid.; 1 H. Brandis on N. C. Evidence, sec. 27 (rev. 2d ed. 1982). No objection or motion to strike the hospital bill appears in the record on appeal before us. Hence, we need not address this argument.

Defendant Lynch did not challenge the amount of the hospital bill as not indicative of the reasonable value of the medical services rendered; therefore, summary judgment in favor of plaintiff for the amount of the bill is

**Affirmed.**

**Judges BECTON and COZORT concur.**

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**State v. Badgett**

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STATE OF NORTH CAROLINA v. KENNETH MICHAEL BADGETT

No. 8617SC194

(Filed 5 August 1986)

**Arrest and Bail § 3.2— check on motorist's limited driving privilege—propriety of arrest**

An officer was justified in approaching defendant where he merely approached a motorist and asked to see a valid license and N. C. permit; the actions took place in public, no extraneous questions were asked, and no "search" occurred; and the officer had specific knowledge that defendant's license had been revoked and that defendant held a limited driving privilege which he may have violated by driving for a social purpose. Furthermore, the officer had probable cause to arrest defendant after detecting the odor of alcohol on his breath and noting the restriction on his limited driving privilege, and the trial court therefore did not err in refusing to suppress the evidence of alcohol on defendant's breath, the results of breath analysis, and evidence that defendant held a limited driving privilege.

APPEAL by defendant from *Wood, Judge*. Judgment entered 11 December 1985 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 10 June 1986.

*Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Isaac T. Avery III, for the State.*

*Harrison, Benson, Worth, Fish & Hall, by A. Wayne Harrison, for defendant appellant.*

BECTION, Judge.

Defendant, Kenneth Michael Badgett, pleaded guilty to driving while his license was revoked or suspended, reserving his right to appeal the trial court's refusal to suppress certain evidence. We affirm the trial court.

The only issue on appeal is whether the trial court erred in refusing to suppress: evidence of alcohol on defendant's breath, the results of a breath analysis, and the fact that defendant held a limited driving privilege.

On 8 August 1985, at 6:20 p.m., Patrolman K. D. Hanks saw defendant driving a car in a residential area. The officer recalled having seen defendant at the police station; he knew defendant's driver's license had been revoked and he had been issued a limit-

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State v. Badgett

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ed driving privilege. The officer also knew limited driving privileges are often issued with the condition that the driver not operate a vehicle with the odor of alcohol on his or her breath. Other conditions placed on limited driving privileges include restrictions on the time, route and purpose of operation of the vehicle, and limited driving privileges never allow the holder to drive for social visits. The officer followed defendant for a few blocks and saw him stop in front of a residence, exit his car, and wave to people off the street. The officer then approached defendant on foot and noticed the odor of alcohol on defendant's breath.

The officer asked to see defendant's license. Defendant produced a Virginia license, which the officer checked and found to be valid. The officer then asked defendant if he had a limited driving permit, which defendant retrieved from a box in the trunk of his car. The officer noted that defendant's permit provided he could not operate a vehicle on public highways with the odor of alcohol on his breath. After reading this restriction, the officer arrested defendant for violating his limited driving privilege. At the police station, defendant submitted to a chemical analysis of his breath, which showed an alcohol concentration of 0.02 at 7:04 p.m. and 0.01 at 7:10 p.m.

It is not seriously contested that once the officer smelled alcohol on defendant's breath, knowing defendant held only a limited driving privilege, the officer had reasonable and articulable suspicion sufficient to permit the officer to ask defendant to produce his North Carolina permit. And the restriction on the permit, combined with the officer's observation, clearly gave the officer probable cause to arrest defendant. The issue, then, is whether the officer violated defendant's right to be free of unreasonable searches and seizures by first approaching him on a public street knowing only that defendant held some sort of limited driving privilege.

It is difficult to ascertain precisely when a "seizure" occurred in this case so as to implicate Fourth Amendment protection. "'No one is protected by the Constitution against the mere approach of police officers in a public place.' *United States v. Hill*, 340 F. Supp. 344 (E.D. Pa. 1972)." *State v. Streeter*, 283 N.C. 203, 208, 195 S.E. 2d 502, 506 (1973). Assuming, without deciding, that a seizure occurred, we must determine whether the officer's deci-

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**State v. Badgett**

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sion to approach the defendant was "justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *State v. Thompson*, 296 N.C. 703, 706, 252 S.E. 2d 776, 778-79 (quoting *Terry v. Ohio*, 392 U.S. 1, 20, 20 L.Ed. 2d 889, 905, 88 S.Ct. 1868, 1879 (1968)), *cert. denied*, 444 U.S. 907, 62 L.Ed. 2d 143, 100 S.Ct. 220 (1979).

Defendant contends that because he was driving in conformance with traffic laws during "standard working hours," there was no reason for the officer to suspect that defendant was violating his limited driving privilege. Although it is true that N.C. Gen. Stat. Sec. 20-179.3 (1983 & 1985 Cum. Supp.) authorizes a court to allow driving for work-related and other purposes during "standard working hours" (from 6:00 a.m. to 8:00 p.m., Monday-Friday, G.S. Sec. 20-179.3(f1)), this decision is in the court's discretion. The court's discretion is limited only to the extent that driving for emergency medical care must be permitted if the limited driving privilege is granted, G.S. Sec. 20-179.3(f), and driving essential to the completion of any court-ordered community work assignments, course of instruction, or treatment program must be allowed, G.S. Sec. 20-179.3(g2). All driving must be limited to one of six "essential purposes." Moreover, additional restrictions on time, route and purpose may be imposed in the court's discretion.

The officer saw defendant driving in a residential area, apparently on a social visit. Although the officer did not know the precise restrictions on defendant's permit, he knew that restrictions vary from permit to permit and often limit driving hours, routes and purposes. Even though defendant was driving during statutory "standard working hours," this did not necessarily mean defendant was within his particular time, route and purpose restrictions. Furthermore, driving for social purposes is never permitted under the statute.

We believe the officer was justified in approaching defendant on these facts. First, the interference with defendant was minimal. The officer merely approached a motorist and asked to see a valid license and North Carolina permit. The actions took place in public, no extraneous questions were asked, and no "search" occurred. Second, the officer's actions were not random; he had specific knowledge that defendant's license had been revoked,



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In re Adoption of Searle

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that defendant held a limited driving privilege, and that he might have been violating his privilege by driving for a social purpose. *Cf. Delaware v. Prouse*, 440 U.S. 648, 59 L.Ed. 2d 660, 99 S.Ct. 1391 (1979) (prohibiting random stops to check license and registration without reasonable or articulable suspicion that driver is unlicensed, vehicle is not registered, or vehicle or driver is otherwise in violation of law). Considering the scope of the intrusion, we conclude that the officer had a reasonable or founded suspicion based on articulable facts sufficient to justify his approach of defendant in a public place. Therefore, we need not consider whether fewer facts would suffice to justify this stop or, indeed, whether approaching this defendant constituted a Fourth Amendment "stop" or "seizure" in the first place.

The officer acted properly in approaching defendant and, after detecting the odor of alcohol on defendant's breath and noting the restriction on his limited driving privilege, had probable cause to make the arrest. Therefore, the trial court was correct in refusing to suppress the evidence in this case.

For the reasons set forth above, we

Affirm.

Judges JOHNSON and COZORT concur.

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IN RE: ADOPTION OF JOSHUA NEAL SEARLE

No. 8626SC70

(Filed 5 August 1986)

**Parent and Child § 1.6— termination of parental rights—sufficiency of evidence**

In a proceeding to have a minor declared abandoned by his natural father, the trial court did not err in denying respondent's motions for directed verdict and for judgment n.o.v. where the action was commenced on 15 November 1983; respondent's behavior between 15 May 1983 and 15 November 1983 was determinative; respondent had no contact with the minor child between 21 January 1981 and 2 August 1983, nor did he provide any maintenance or support; on 31 July 1983, petitioner telephoned respondent and stated that he wished to adopt respondent's minor son; after respondent consulted his attorney on 2 August 1983, the child's mother received \$500 in support money

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**In re Adoption of Searle**

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from respondent; respondent sent no support checks in September, October or November of 1983; and it was a question for the jury as to whether the sending of the money was inconsistent with a willful intent to abandon or whether the sending of the money was too little, too late.

APPEAL by respondent from *Griffin, Judge*. Judgment entered 21 August 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 4 June 1986.

Joshua Neal Searle, a minor, is the only child born of the marriage between Susan Brewster, wife of petitioner James Brewster, and respondent Frederick Leon Searle. On 15 November 1983, petitioner commenced a special proceeding to have the minor declared abandoned by his natural father.

A hearing was held on the alleged abandonment, and at the close of the evidence, the following issue was submitted to the jury and answered as indicated:

Did Respondent, Frederick L. Searle, abandon Joshua Neal Searle for at least six consecutive months immediately before November 15, 1983?

ANSWER: Yes.

Respondent's motions for directed verdict, made at the close of petitioner's evidence and at the close of all evidence, and for judgment n.o.v. were denied by the court. The court entered judgment on the jury's verdict that respondent had abandoned his son. Respondent appealed.

*Casstevens, Hanner, Gunter and Gordon, P.A., by Robert P. Hanner, II, and W. David Thurman for petitioner-appellee.*

*Ronald Williams, P.A., for respondent-appellant.*

PARKER, Judge.

Respondent's first contention on this appeal is that the trial court erred in denying his motions for directed verdict and for judgment n.o.v. because the evidence, when considered in the light most favorable to petitioner, failed to establish a willful abandonment. We disagree.

Prior to 1 October 1985, two procedures were available to enable a petitioning party to adopt a minor child without the con-

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In re Adoption of Searle

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sent of the opposing biological parent. First, under G.S. 7A-289.32, a court could terminate the parental rights of a biological parent upon a finding of one of the grounds enumerated therein. Pursuant to G.S. 48-5, once a district court had entered an order terminating the parental rights of a biological parent, that parent was no longer a necessary party to an adoption proceeding.

Second, the court, upon proper motion, was authorized to hold a hearing "to determine whether an abandonment as defined in G.S. 48-2(1)a and (1)b ha[d] taken place." G.S. 48-5(d). However, effective 1 October 1985, these proceedings were merged into one termination of parental rights proceeding under G.S. 7A-289.32(8) to ascertain whether "[t]he parent has willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition."

In the case *sub judice*, the action was commenced on 15 November 1983, and the judgment was entered on 21 August 1985. Because both of these dates occurred prior to the effective date of the amendment, we must examine this case in light of the statute as it existed prior to the new amendment.

General Statute 48-2(1)a provided in pertinent part:

For the purpose of this Chapter, an "abandoned child" shall be any child who has been willfully abandoned at least six consecutive months immediately preceding institution of an action or proceeding to declare the child to be an abandoned child.

Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. *Pratt v. Bishop*, 257 N.C. 486, 126 S.E. 2d 597 (1962). The word "willful" encompasses more than an intention to do a thing; there must also be purpose and deliberation. *In re Clark v. Jones*, 67 N.C. App. 516, 313 S.E. 2d 284, *disc. rev. denied*, 311 N.C. 756, 321 S.E. 2d 128 (1984).

A motion for judgment notwithstanding the verdict like a motion for directed verdict, tests the sufficiency of the evidence to go to the jury, and the applicable standard is the same for both motions. The court must view the evidence in the light most favorable to the nonmovant, giving him the benefit of every infer-

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*In re Adoption of Searle*

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ence that could reasonably be drawn from the evidence. *West v. Slick*, 313 N.C. 33, 326 S.E. 2d 601 (1985). If there are conflicts in the evidence permitting different inferences, a directed verdict is improper because the credibility of the testimony is for the jury, not the trial judge. *Population Planning Associates v. Mews*, 65 N.C. App. 96, 308 S.E. 2d 739 (1983).

Under this standard, petitioner's evidence was sufficient to show that respondent willfully abandoned his minor child. The relevant time period under G.S. 48-2(1)a is "at least six consecutive months immediately preceding institution" of an abandonment action. Since this action was commenced on 15 November 1983, respondent's behavior between 15 May 1983 and 15 November 1983 is determinative. Respondent had no contact with the minor child between 21 January 1981 and 2 August 1983, nor did he provide any maintenance or support. On 31 July 1983, petitioner telephoned respondent and stated that he wished to adopt respondent's minor son. After respondent consulted his attorney on 2 August 1983, Mrs. Brewster received \$500.00 in support money from respondent. Respondent sent no support checks to Mrs. Brewster in September, October or November of 1983.

Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence. *Pratt, supra*. As this Court stated in *In re Cardo*, 41 N.C. App. 503, 506, 255 S.E. 2d 440, 442 (1979), "[l]egal abandonment . . . is not a transitory concept that may be recessed at the whim of the transgressor." In our view, a directed verdict would have been inappropriate in this case because a reasonable jury could have decided that the sending of this money was inconsistent with a willful intent to abandon, or it could have decided that the sending of this support money was too little, too late. This jury apparently reached the latter conclusion. That either conclusion was supportable by the evidence demonstrates the inappropriateness of a directed verdict or judgment notwithstanding the verdict in respondent's favor.

We are not persuaded by respondent's arguments that he could not visit the child because (i) he was incarcerated until 30 July 1982, or (ii) a prior custody order denied him visitation privileges. Respondent had been released from prison for over one year before he sent any support money, and respondent ad-

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**Cook v. Southern Bonded, Inc.**

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mitted in his testimony that the custody order did not prevent him from supporting, calling or corresponding with the child. The assignment of error is overruled.

Next, respondent contends the court erred in refusing to admit into evidence the Mecklenburg Child Support Guidelines on the issue of whether his \$500.00 support contribution was adequate. His argument is that his gross earnings during the six months next preceding 15 November 1983 were \$1175.00, and that his \$500.00 child support payment substantially exceeded the amount suggested by the guideline. This argument is meritless because (i) respondent did not request the court to admit the guideline into evidence, but rather requested the court to take judicial notice of the guideline, and (ii) the guideline was dated 11 June 1984, which was clearly irrelevant to the critical time interval between 15 May 1983 through 15 November 1983. The assignment of error is overruled.

Finally, respondent attempts to assert for the first time on this appeal that this termination proceeding violated the minor child's due process rights under the state and federal constitutions. Appellate courts in this state will not consider constitutional arguments which were not raised and ruled upon at the trial level. *Powe v. Odell*, 312 N.C. 410, 322 S.E. 2d 762 (1984).

No error.

Judges PHILLIPS and MARTIN concur.

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IOLA COOK, EMPLOYEE, PLAINTIFF v. SOUTHERN BONDED, INC., D/B/A CAROLINA QUILTERS, EMPLOYER, AND AETNA CASUALTY AND SURETY INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8610IC273

(Filed 5 August 1986)

**Master and Servant § 94.3— workers' compensation--motion to reopen case not timely**

Plaintiff's request to reopen her workers' compensation claim was made more than two years after plaintiff received the last payment of compensation, and plaintiff's request for review was thus properly denied pursuant to N.C.G.S. § 97-47.

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**Cook v. Southern Bonded, Inc.**

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APPEAL by plaintiff from the North Carolina Industrial Commission opinion filed 14 October 1985. Heard in the Court of Appeals 12 June 1986.

This is a claim under the Workers' Compensation Act whereupon plaintiff requested a review of a prior award pursuant to G.S. 97-47.

The facts pertinent to this appeal are contained in the following summary of selected stipulations of the parties, adopted in the opinion of Deputy Commissioner Bryant, and the opinion of the Full Commission: In an opinion and award filed 6 March 1980, plaintiff's initial claim was allowed. In a subsequent opinion and award filed 18 March 1982, compensation was determined, with plaintiff receiving an award for temporary total disability and for permanent disability of five percent (5%) of her back. On 1 April 1982, defendants appealed the opinion and award determining compensation. Defendants withdrew their appeal by letter dated 21 June 1982. By order filed 28 June 1982, the Full Commission dismissed the appeal. In a letter dated 26 June 1984, plaintiff's counsel wrote the Industrial Commission requesting information regarding plaintiff's prior award. The letter stated, "The claimant has expressed an interest in reopening her claim, and I need to know when the last Industrial Commission ruling regarding her case was made." In a letter dated 27 July 1984 and received by the Industrial Commission on 30 July 1984, plaintiff reopened her claim by expressing her desire to "make a claim for additional compensation because of injuries received from a job related accident while working at Southern Bonded, Inc." Plaintiff requested a hearing.

Plaintiff's request for review came on for hearing on 3 April 1985 and 29 May 1985 before Deputy Commissioner Bryant. It was agreed by the parties that whether plaintiff was entitled to a rating of more than five percent (5%) permanent partial disability of the back "may be initially decided upon the issue of whether plaintiff's claim has been timely filed within the meaning of G.S. 97-47." Deputy Commissioner Bryant dismissed plaintiff's claim for failure to request the reopening of her claim in two years or less from the date of the last payment of compensation under her initial award. Plaintiff appeals.

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**Cook v. Southern Bonded, Inc.**

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*Jackson & Holmes, by Harvey D. Jackson, for plaintiff appellant.*

*Royster, Royster & Cross, by S. S. Royster, for defendant appellees.*

JOHNSON, Judge.

We note at the outset that although plaintiff did not properly note exceptions and assignments of error in accordance with Rule 10, N.C. Rules App. P., plaintiff did present for review by properly raising in her brief the question whether the judgment appealed from is supported by the findings of fact and conclusions of law as provided in Rule 10(a), N.C. Rules App. P. Our scope of review will be limited accordingly.

The sole question presented by plaintiff for review is whether the Commission erred in dismissing her claim for additional benefits for the reason that her request for review was untimely. One who has received an award of compensation under the Workers' Compensation Act may move the Industrial Commission to review the prior award on the grounds of a change in condition under G.S. 97-47. However, G.S. 97-47 has an express time limitation, as follows:

[N]o such review shall be made after two years from the date of the last payment of compensation pursuant to an award under this Article, except that in cases in which only medical or other treatment bills are paid, no such review shall be made after 12 months from the date of the last payment. . . .

G.S. 97-47.

In the order dismissing plaintiff's request for a review, Deputy Commissioner Bryant made the following findings of fact:

1. Plaintiff was last paid compensation in this matter by check dated April 8, 1982 and that was negotiated at least as of June 3, 1982.
2. Plaintiff filed to reopen this claim on July 27, 1984 and the same was more than two years after her last payment of compensation.

Upon review, the Full Commission adopted "as its own" the deputy commissioner's opinion. As stated above, because plaintiff

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**Cook v. Southern Bonded, Inc.**

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did not except to these findings they are conclusive on appeal. The last payment of compensation within the meaning of G.S. 97-47 is the date the last check was delivered to and accepted by the employee. *Baldwin v. Amazon Cotton Mills*, 253 N.C. 740, 744, 117 S.E. 2d 718, 721 (1961). The findings support the conclusion of law that plaintiff's request to reopen her claim was more than two years after plaintiff received the last payment of compensation. This conclusion in turn supports an order denying plaintiff's request to review her prior award.

Plaintiff contends that defendants are estopped from claiming the lapse of time as a bar to plaintiff's claim for additional compensation because (1) plaintiff did not recall receiving a Form 28B with the check for the amount of compensation and (2) defendants' appeal, pending until dismissed by order of the Full Commission on 28 June 1982, prevented the limitations period from running at a date earlier than the date of dismissal. We find both arguments unpersuasive.

One, a Form 28B, dated 8 April 1982, was received by the Industrial Commission on 19 April 1982 and placed in the Industrial Commission's file. Mrs. Cook testified that she did not know whether the check was accompanied by a Form 28B; that her attorney received the compensation check in the mail; and that she went to his home to pick up the check. Plaintiff's contention is contrary to the express provisions of G.S. 97-47. *Willis v. Davis Industries*, 280 N.C. 709, 714, 186 S.E. 2d 913, 916 (1972). The statute expressly provides that the time limitation commences to run from the date on which he received the last payment of compensation, not from the date on which the employee received a Form 28B. *See id.* at 714-15, 186 S.E. 2d at 916. Two, plaintiff did not except to an omitted finding of fact that plaintiff did not receive a Form 28B. As stated previously, the findings in the record before us cannot be challenged on this appeal. Rule 10, N.C. Rules App. P.

Plaintiff's second contention is also contrary to the express provisions of the statute. For the same reasons that the time limitation does not commence to run upon the employee's receipt of a Form 28B, posited above, it does not commence to run upon the dismissal of an appeal. After reviewing the entire record we find no equitable grounds that would allow plaintiff to circumvent the clear language of the statute.



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State v. Williams

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Plaintiff is correct in stating that the order dismissing plaintiff's claim erroneously stated as the basis for its dismissal that the Industrial Commission lacked subject matter jurisdiction. In *Pennington v. Flame Refractories, Inc.*, 53 N.C. App. 584, 281 S.E. 2d 463 (1981), this Court stated, "This two year limitation is not jurisdictional. It merely provides a defense . . . which the employer may assert." *Id.* at 587-88, 281 S.E. 2d at 466. However, the error is not prejudicial. It is a familiar rule in appellate procedure that the appellant must not only show error, but also that the error is material and prejudicial, amounting to a denial of a substantial right and that a different result would have likely ensued. *Sisson v. Royster*, 228 N.C. 298, 301, 45 S.E. 2d 351, 354 (1947). Because no other result could ensue other than a denial of plaintiff's request for review for lack of timeliness, the order of the Full Commission is

Affirmed.

Judges BECTON and COZORT concur.

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STATE OF NORTH CAROLINA v. FRANKIE WILLIAMS

No. 858SC1264

(Filed 5 August 1986)

**1. Criminal Law § 34.5— evidence of another crime—admissibility to show identity of defendant**

In a prosecution of defendant for armed robbery where defendant presented evidence of alibi, the principal issue was the identity of defendant as the perpetrator of the crimes charged, and the trial court therefore did not err in admitting testimony concerning another armed robbery which occurred two days after the robberies with which defendant was charged where witnesses testified that on both occasions defendant was picked up in a taxi at a public place at approximately the same time; the weapon used in each offense was a knife with a blade about five or six inches in length; the robberies occurred upon arrival at the destination given to the driver; and defendant was identified as the robber.

**2. Criminal Law § 95.2— testimony admitted for limited purpose—instruction sufficient**

There was no merit to defendant's contention that the trial court failed to instruct the jury that a witness's testimony was admitted only for the limited purpose of establishing identity.

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**State v. Williams**

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APPEAL by defendant from *Tillery, Judge*. Judgment entered 11 July 1985 in Superior Court, WAYNE County. Heard in the Court of Appeals 15 April 1986.

On 6 May 1985, defendant was indicted by the Wayne County grand jury for two counts of armed robbery in violation of G.S. 14-87. Defendant pled not guilty to both counts of armed robbery. On 10 July 1985, defendant was tried before a jury.

The State's evidence presented at trial tended to show the following:

On Sunday, 24 February 1985, Glenda Swinson, a taxicab driver employed by City Cab Company was dispatched to pick up an individual at the bus station. Upon reaching the bus station, Ms. Swinson was hailed by a black man wearing a grey sweat-shirt, blue sweatpants, white sneakers and one glove. Ms. Swinson picked up the man and also picked up a woman passenger, Karen McClennahan, at the bus station. Ms. Swinson drove the male passenger to his requested destination, and when he reached into his bag to retrieve his fare, he instead pulled out a knife and demanded her money. Ms. Swinson complied with his request. The individual then turned upon Ms. McClennahan and demanded that she also give him money. Ms. McClennahan also complied with the robber's demands. The individual then left the cab, whereupon Ms. Swinson radioed for the police and reported the robbery.

Each victim separately viewed photographs presented to them by the Goldsboro Police Department and both victims identified defendant Frankie Williams as the person who robbed them.

At trial, Ms. Swinson and Ms. McClennahan identified defendant as the person who perpetrated the robberies of them. Mr. Molton Barnes, a taxicab driver employed by Safety Cab Company, testified that on 26 February 1985, a man entered his taxicab, pulled out a large knife and attempted to rob him, but he was able to thwart the robbery attempt. Mr. Barnes identified defendant as the man who attempted to rob him.

Defendant testified in his behalf to the effect that he resided in Maryland; that on 24 February 1985, he was in Greensboro, North Carolina; that he had no independent recollection of the

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State v. Williams

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Sunday in question; that he visited his girlfriend every Sunday evening in February 1985; and that he did not participate in the armed robbery of any taxicab drivers. The jury found defendant guilty on both counts of robbery with a dangerous weapon. From a judgment imposing two consecutive fourteen year prison terms, defendant appeals.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Philip A. Telfer, for the State.*

*Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Robin E. Hudson, for defendant.*

JOHNSON, Judge.

[1] Defendant assigns error to the admission of testimony by Molton Barnes concerning the nearly identical robbery of Mr. Barnes two days after the robbery of Ms. Swinson and Ms. McClennahan. We find no error in the admission of this evidence.

Defendant argues that this evidence should have been excluded under G.S. 8C-1, Rule 404(b) which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of mistake, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

As a general rule, the State cannot introduce evidence tending to show that an accused has committed an offense other than the one for which he is being tried. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). The general rule is subject to exceptions as follows:

4. Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged. . . .

*Id.* at 175, 81 S.E. 2d at 367.

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**State v. Williams**

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We have interpreted this language to be applicable where the accused is not definitely identified. *State v. Streath*, 73 N.C. App. 546, 327 S.E. 2d 240, *disc. rev. denied*, 313 N.C. 513, 329 S.E. 2d 402 (1985). "Thus, unless the defendant presents alibi evidence, evidence of other crimes to show identity, either directly or indirectly (common plan), should not be admitted under *McClain*." *Id.* at 550, 327 S.E. 2d 242. We again note, as we did in *Streath* that no change has occurred in the operative framework of our evidentiary rules; therefore, we must still conclude that the State could properly present this evidence of other misconduct in its case in chief if it fit the *McClain* exceptions.

In the case at bar, the principal issue was the identity of defendant as the perpetrator of the crimes charged. Although Ms. Swinson and Ms. McClennahan identified defendant as the perpetrator, his evidence of alibi made the issue of whether he was in fact the perpetrator "the very heart of the case." *State v. Freeman*, 303 N.C. 299, 302, 278 S.E. 2d 207, 208-09 (1981).

Evidence of other misconduct is admissible under the identity exception upon a showing of unusual facts present in both acts, or particularly similar acts which tend to show that the same person committed both. *Streath, supra*, at 551, 327 S.E. 2d at 243. Witnesses in the case *sub judice* testified that on both occasions defendant was picked up in a taxi at a public place and at approximately the same time; that the weapon used in each offense was a knife with a blade about five to six inches in length; that the robberies occurred upon arrival at the destination given to the driver; and that defendant was the robber. We conclude that the incidents were sufficiently similar that the evidence was properly admitted.

[2] Defendant's final contention is that the trial court failed to give a limiting instruction regarding the testimony of Mr. Barnes, even though such an instruction was requested by counsel and agreed upon by the court. Defendant argues that Mr. Barnes' testimony was only admitted for the limited purpose of establishing identity; therefore, the trial court should have instructed the jury accordingly.

The trial judge, in the portion of the jury instructions pertinent to this assignment of error, instructed the jury as follows:

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State v. Blankenship

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Touching on the alleged events of February 26th at the library and after, I would say this to you. (trial judge speaking to jury) Of course, you understand that Mr. Williams is not on trial for anything alleged to have occurred on the 26th of February of 1985. Given the time interval between the two alleged events, the circumstances surrounding the two events and the selection of this defendant as the robber by each alleged victim, *the evidence of the event of February 26th involving Molton Barnes is competent on the question of the identity of the robber on the 24th.* It is only that, however, and is entitled to only so much weight as you decide that it is entitled to have in the light of all of the other credible evidence in the case. (Emphasis added.)

We find that the jury was properly instructed as to the limited admissibility of Mr. Barnes' testimony. We find defendant's contention is without merit.

In defendant's trial we find

No error.

Judges ARNOLD and WHICHARD concur.

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STATE OF NORTH CAROLINA v. WILLIAM HARVEY BLANKENSHIP

No. 862SC17

(Filed 5 August 1986)

**Homicide § 28.1— self-defense—failure to instruct error**

The trial court in a homicide case erred in failing to charge on self-defense where defendant's evidence tended to show that he was in the home of a friend upon her invitation; deceased was bigger and stronger than defendant; deceased grasped defendant's throat and held him off the ground while choking him; and defendant did not intend to shoot deceased but instead intended to use the gun as a club to defend himself.

APPEAL by defendant from *Barefoot, Judge*. Judgment entered 15 August 1985 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 3 June 1986.

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**State v. Blankenship**

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The defendant was charged in a proper bill of indictment with the first degree murder of Stevie Foster. The State's evidence tends to show that on 22 November 1984 the defendant was at the home of Joy Melvin Wright in Washington, North Carolina. Ms. Wright went to the store, leaving the defendant alone in the house. On her way she encountered her boyfriend, the deceased, whom she told of the defendant's presence in the house. The deceased stated "I don't like [the defendant]. He sent a lot of my friends to prison down at Morehead, and I don't want to be around him." Ms. Dixon told the deceased that he should ask the defendant to leave. When Ms. Dixon returned from the store she saw the defendant running across the backyard. The defendant told her that he was leaving because he did not want a fight. Later that afternoon the deceased and others were at Ms. Wright's house when the defendant returned wearing his "fighting clothes." Several witnesses testified that the defendant entered the living room, pulled a gun from his coat pocket and shot the deceased from across the room.

The defendant testified that before he encountered the deceased, Ms. Wright told him that "her boyfriend had been drinking that day and that he got mean when he was drinking, he liked to fight, and that if he said anything to us, me and Ricky both, when he came back, just to get up and leave." After Ms. Wright left the defendant alone in the house the deceased entered the house, accused the defendant of being a "snitch from Morehead," and then asked the defendant if he wanted to fight about it. The defendant left the house to avoid a fight. Another man told the defendant the deceased was "always like that." After returning to his house the defendant changed his clothes, realized he had left money from a beer purchase with Ms. Wright and decided to return for the money.

The defendant testified further that before returning to the house he borrowed a gun for protection. When he and his girlfriend arrived at Ms. Wright's house, the defendant told her that if a woman answered the door he would go in to get the money but that if a man answered the door she should go in because he did not want to get into a fight. When he knocked on the door a woman said "come in" and he entered. The deceased immediately rushed toward the defendant, grabbed him by the neck and began choking him while holding him six to eight inches off the ground.

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*State v. Blankenship*

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The deceased was larger and stronger than the defendant. When the defendant was unable to remove the deceased's hands from his neck he pulled the gun from his pocket in an effort to hit the deceased in the head. The deceased grabbed the gun, they struggled and the deceased was shot. The defendant testified the gun went off during the struggle and he never intended to shoot the deceased.

The defendant was convicted of second degree murder. He appealed from a prison sentence of forty years.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Steven F. Bryant, for the State.*

*Wayland J. Sermons, Jr., P.A., for the defendant appellant.*

WEBB, Judge.

The defendant assigns error to the court's failure to charge on self-defense. We believe this assignment of error has merit.

The right to act in self-defense is based upon necessity, real or apparent, and a person may use such force as is necessary or apparently necessary to save himself from death or great bodily harm in the lawful exercise of his right to self-defense. A person may kill even though it be not necessary to kill to avoid death or great bodily harm if he believes it to be necessary and he has reasonable grounds for such belief. The reasonableness of his belief is to be determined by the jury from the facts and circumstances as they appeared to the accused at the time of the killing.

*State v. Deck*, 285 N.C. 209, 214, 203 S.E. 2d 830, 834 (1974). In this case the defendant testified the deceased grasped his throat and was holding him off the ground while choking him. If the jury had believed this testimony they could have found that the defendant reasonably believed he was in danger of death or great bodily harm. It was for the jury to determine whether the defendant used more force than was necessary to protect himself. The jury could have found that the defendant did not intend to shoot the deceased but intended to use the pistol as a club in defending himself. If they had found that he did so but the pistol went off accidentally during the struggle they should have found the defendant not guilty. If the jury had found that the defendant inten-

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**State v. Blankenship**

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tionally shot the deceased they should have determined whether he reasonably believed it was necessary to shoot the deceased to protect himself from death or great bodily harm.

We do not believe *State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750 (1973), *State v. Ogburn*, 60 N.C. App. 598, 299 S.E. 2d 454, *disc. rev. denied*, 308 N.C. 546, 304 S.E. 2d 240 (1983), or *State v. Berry*, 35 N.C. App. 128, 240 S.E. 2d 633, *cert. denied*, 294 N.C. 737, 244 S.E. 2d 155 (1978), upon which the State relies, are precedent for this case. In *Watkins* there was no evidence of a felonious assault. In this case the defendant's evidence was that the deceased was a larger and stronger man than the defendant. The deceased was holding the defendant off the floor by the throat and choking him. The jury could find from this evidence that the defendant was in reasonable apprehension of death or great bodily harm. In *Ogburn* the defendant's evidence showed the victim was shooting at the defendant when the defendant pushed the victim's hand and the victim accidentally shot herself. In this case there was evidence from which the jury could have concluded that the shooting was an accident or that the defendant intentionally shot the deceased. In *Berry* the defendant's evidence showed he was holding a pistol at his side when the deceased struck the pistol, causing it to discharge. This provided no evidence of self-defense.

The State also contends the defendant may not rely on self-defense because the evidence showed he entered the fight without a lawful excuse. See *State v. Hunter*, 315 N.C. 371, 338 S.E. 2d 99 (1986); *State v. Montague*, 298 N.C. 752, 259 S.E. 2d 899 (1979); *State v. Wynn*, 278 N.C. 513, 180 S.E. 2d 135 (1971); and *State v. McConnaughey*, 66 N.C. App. 92, 311 S.E. 2d 26 (1984). The jury could have found from the evidence that the defendant was in a place he had a right to be and that he did not bring on the altercation. This would give him the right to use self-defense.

We do not discuss the defendant's other assignments of error. We find that as to each of them there was either no error or the questions they raised should not recur at a new trial.

New trial.



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**Adkins v. Adkins**

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Judge WHICHARD concurs.

Judge JOHNSON concurs in the result.

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**JUNE ADKINS (HALL) v. ROGER DEAN ADKINS**

No. 8618DC153

(Filed 5 August 1986)

**1. Divorce and Alimony § 24.6; Estoppel § 4.7— action for arrearages in child support—no equitable estoppel**

In an action to recover for arrearages in child support, defendant could not rely on the defense of equitable estoppel since an essential element of that defense is reasonable reliance upon assertions by plaintiff; defendant stopped making support payments in 1971 and never showed any intention of resuming the payments; and defendant therefore did not change his position in reliance on representations made by plaintiff in 1975 that she and her new husband were instituting adoption proceedings so that the child could use the surname of her stepfather.

**2. Divorce and Alimony § 24.6; Limitation of Actions § 4.3— child support arrearages over 10 years old—failure to plead statute of limitations**

The district court did not err in holding defendant liable for child support arrearages from more than ten years ago, though a child support order is a judgment directing payment of a sum of money and it falls within the ten-year statute of limitations of N.C.G.S. § 1-47, since the statute was an affirmative defense which defendant was required to specifically plead, and this he failed to do.

**3. Divorce and Alimony § 24.4— child support arrearages—enforcement by contempt—property with which to pay arrearages—findings sufficient**

There was no merit to defendant's contention that the trial court erred in ordering him imprisoned without having established that he had property free and clear of any liens that he could use to purge himself of the alleged contempt, since evidence of defendant's earnings and evidence that he completed a new home two years earlier which he put up for sale when the motion in the cause was filed, that he owned three cars, and that he owned at least three tractor-trailer trucks in his furniture business was sufficient to support the trial court's finding that defendant had the present ability to comply with the order requiring payment of child support arrearages; however, it would have been better for the court to make specific findings showing defendant's present means to pay.

APPEAL by defendant from *Hunter, Judge*. Judgment entered 28 August 1985 in District Court, GUILFORD County. Heard in the Court of Appeals 11 June 1986.

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**Adkins v. Adkins**

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Plaintiff and defendant were married in 1968. One child, Jodie Renee Adkins, was born of the marriage in March 1969; the parties separated in August 1969. By order dated January 22, 1970, defendant was ordered to pay \$15.00 per week child support. The parties were divorced in September 1971, and custody of the minor child was awarded to plaintiff. After making a few child support payments, defendant stopped and has made no payments since 1 February 1971.

Plaintiff remarried, and in 1975 her new husband began adoption proceedings so that the minor child could use the surname of her stepfather. Defendant signed a document consenting to the adoption. However, the formal adoption was never completed, and the proceedings were dismissed. Defendant was not informed of the dismissal of the adoption proceeding, and the child began using her stepfather's name anyway.

In April 1985, the child, then sixteen years old, left the home of her mother and stepfather and went to live with her father. Her mother, plaintiff, instituted this proceeding by motion in the cause in July 1985, seeking to have defendant held in contempt for failure to pay the \$15.00 per week child support and claiming \$12,285 in arrearages. Defendant answered, asserting the affirmative defense of equitable estoppel and seeking custody of the child.

The District Court judge found that defendant had willfully failed to pay the ordered child support despite having, at all times since the order was entered, the means to pay the support. The court further found that defendant was not entitled to the defense of equitable estoppel as he had ceased making payments long before hearing about any adoption plans. Defendant was ordered jailed for contempt of court until such time as he paid \$11,070 in arrearages and resumed the required \$15.00 per week payments.

*J. S. Pfaff for plaintiff-appellee.*

*The Law Firm of Joe D. Floyd, P.A., by Philip R. Skager for defendant-appellant.*

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Adkins v. Adkins

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PARKER, Judge.

[1] Defendant first assigns as error the failure of the trial court to grant his motion to dismiss based on the defense of equitable estoppel. The trial court denied this motion based on the finding that defendant had not relied upon the adoption of the child in not making payments which he had stopped in 1971. Both defendant and the child testified that they each believed that she had been adopted by plaintiff's husband in April 1975, and did not learn differently until the child went with defendant to get her driver's license in 1985.

We agree with the district court that defendant was not entitled to the defense of equitable estoppel in this case. An essential element of that defense is reasonable reliance upon assertions by plaintiff. *Webber v. Webber*, 32 N.C. App. 572, 232 S.E. 2d 865 (1977). Defendant stopped making payments in 1971 and has never shown any intention of resuming the payments. Clearly, then, he did not change his position in reliance on representations made by plaintiff in 1975. This assignment of error is overruled.

[2] By his next assignment of error, defendant contends the district court erred in holding him liable for support arrearages from more than ten years ago. A child support order is a judgment directing payment of a sum of money and falls within the ten-year statute of limitations of G.S. 1-47. *Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E. 2d 561 (1977). However, the statute of limitations, as well as the equitable defense of laches, are affirmative defenses which defendant must specifically plead. G.S. 1A-1, Rule 8(c). Defendant failed to plead these affirmative defenses and they cannot be raised for the first time on appeal. *Delp v. Delp*, 53 N.C. App. 72, 280 S.E. 2d 27, *disc. rev. denied*, 304 N.C. 194, 285 S.E. 2d 97 (1981).

[3] Defendant's final assignment of error is that the trial court erred in ordering him imprisoned without having established that he had property free and clear of any liens that he could use to presently purge himself of the alleged contempt. The standard is not having property free and clear of any liens, but rather that one has the present means to comply with the court order and hence to purge oneself of the contempt. Put differently, is the individual able to take reasonable measures to comply with the order? Reasonable measures may well include liquidating equity

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*Adkins v. Adkins*

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in encumbered assets. In this case the trial judge made the following finding:

15. That defendant was possessed with the means to comply with the Order of this Court as entered and as hereinabove set out and currently and presently possesses the means and ability to comply with said Order and has possessed such means and ability in the interim period, and failed to provide said \$15.00 per week.

Review in contempt proceedings is limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. *Cox v. Cox*, 10 N.C. App. 476, 179 S.E. 2d 194 (1971). Plaintiff testified that defendant completed a new home two years earlier which he put up for sale when the motion in the cause was filed; that defendant owns a 280-Z, a new Monte Carlo, and a Ford Bronco; and that he owns at least three tractor-trailer trucks in his furniture business. This evidence, which from the record before this Court, was uncontroverted, and the evidence of defendant's earnings were sufficient to support the court's finding of fact. Though not specific, the finding regarding "present means to comply" is minimally sufficient to satisfy the statutory requirement for civil contempt. G.S. 5A-21(a)(3); see *Plott v. Plott*, 74 N.C. App. 82, 327 S.E. 2d 273 (1985). This case is distinguishable from *McMiller v. McMiller*, 77 N.C. App. 808, 336 S.E. 2d 134 (1985), relied on by defendant. In *McMiller* the order contained no finding whatever as to that defendant's present means to purge himself of the contempt; the only finding was that the defendant "has had" the ability to comply with the support order.

Again, however, we reiterate that specific findings supporting the contemnor's present means are preferable. This concept is not new in the jurisprudence of North Carolina. In *Mauney v. Mauney*, 268 N.C. 254, 257, 150 S.E. 2d 391, 394 (1966) Branch, J. (now C.J.) quoted as follows from *Vaughan v. Vaughan*, 213 N.C. 189, 193, 195 S.E. 351, 353 (1938) wherein the plaintiff was the supporting spouse cited for contempt:

' . . . the court below should take an inventory of the property of the plaintiff; find what are his assets and liabilities and his ability to pay and work—an inventory of his financial condition.'

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**Benfield v. Pilot Life Ins. Co.**

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*See also Teachey v. Teachey*, 46 N.C. App. 332, 264 S.E. 2d 786 (1980). The purpose of civil contempt is to coerce compliance with a court order; therefore, present ability or means to satisfy that order is essential. Defendant's final assignment of error is overruled.

The judgment is

Affirmed.

Judges ARNOLD and EAGLES concur.

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CAROL W. BENFIELD v. PILOT LIFE INSURANCE COMPANY

No. 8619DC222

(Filed 5 August 1986)

**Insurance § 29— husband and wife living apart—no legal separation—wife's right to life insurance proceeds**

Plaintiff was not legally separated from her husband at the time of his death so as to bar her from receiving life insurance proceeds, though she was living separate and apart from him pursuant to a Temporary Protective Order under N.C.G.S. Chapter 50B, since the Order was not issued as a part of a proceeding to affect the marital status of the parties and thus did not constitute a legal separation.

APPEAL by defendant from *Grant, Judge*. Judgment entered 24 January 1986 in District Court, ROWAN County. Heard in the Court of Appeals 12 June 1986.

*Burke and Donaldson, by Arthur J. Donaldson, for plaintiff appellee.*

*Kluttz, Hamlin, Reamer, Blankenship and Kluttz, by Malcolm B. Blankenship, Jr., for defendant appellant.*

BECTON, Judge.

This action was brought by Carol W. Benfield to recover life insurance proceeds under a group policy providing benefits upon the death of her spouse unless they were legally separated. The trial court found that Carol Benfield and her husband were not

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**Benfield v. Pilot Life Ins. Co.**

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legally separated at the time of his death; thus, Mrs. Benfield was entitled to the proceeds. Pilot Life Insurance Company (Pilot Life) appeals. We affirm.

Pilot Life issued a policy through Carol Benfield's employer, Carter Chair Corporation, providing for a \$2,000 death benefit payable to Mrs. Benfield upon the death of her husband. Under the terms of the policy, Mr. Benfield was an eligible dependent unless they were "legally separated or divorced." Prior to and continuing until the time of his death, Mr. and Mrs. Benfield had experienced domestic difficulty. In February 1985, Mrs. Benfield obtained a Temporary Protective Order under Chapter 50B. This temporary order, later renewed, contained findings that Mr. Benfield had physically assaulted Mrs. Benfield, ordered him to vacate and not return to the family residence, and granted exclusive possession and full use of the home to Mrs. Benfield. The Benfields did not live together from the date of the first protective order until Mr. Benfield's death in April 1985.

Pilot Life contends that the Temporary Protective Order issued by the court is a judicial acknowledgment of the parties' legal right to live apart and constitutes a "legal separation" as contemplated by the parties to the insurance contract. We might agree with Pilot Life's argument if the contract language involved were non-technical and its meaning derived solely from ordinary speech. See *Wachovia Bank and Trust Co. v. Westchester Fire Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970). However, the phrase "unless you are legally separated or divorced" clearly connotes the legal status of the policyholder and is a technical usage defined by statute and case law. "Legally separated" has a more specialized meaning than "all instances in which spouses live apart in accordance with a judicial decree." Were it otherwise, a judicial decree sentencing one spouse to a prison term could be viewed as a legal separation in that it is a judicial acknowledgment of the obligation to live apart.

A decree of divorce from bed and board, a decree of alimony without divorce under former G.S. Sec. 50-16, or a valid separation agreement may constitute a "legal separation" which thereafter will permit either of the parties to obtain an absolute divorce on the ground of one year's separation. *Harrington v. Harrington*, 286 N.C. 260, 210 S.E. 2d 190 (1974). A court order

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**Benfield v. Pilot Life Ins. Co.**

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awarding alimony *pendente lite* and exclusive possession of the family residence also is a "legal separation." *Earles v. Earles*, 29 N.C. App. 348, 224 S.E. 2d 284 (1976); *Johnson v. Johnson*, 12 N.C. App. 505, 183 S.E. 2d 805 (1971). Common to these judicial decrees is the suspension of cohabitation between husband and wife without dissolving the marriage bond. *Rouse v. Rouse*, 258 N.C. 520, 128 S.E. 2d 865 (1963). This is also the effect of a Temporary Protective Order under Chapter 50B. Yet the judicial decrees previously found to constitute legal separations were entered in actions whose ultimate purpose was to affect the legal status of the parties as husband and wife. In contrast, the Supreme Court in *Harrington* held that in a custody proceeding, a finding that the wife had abandoned her husband did not constitute a legal separation.

The Temporary Protective Order was not issued as a part of a proceeding to affect the marital status of the parties. North Carolina General Statute Section 50B-3 (1984) provides for the granting of possession of the household to one spouse and exclusion of the other spouse for the purpose of ending domestic violence. Such protective orders are for a fixed time period, not to exceed one year. It is true that an award of alimony *pendente lite* coupled with exclusive possession of the family residence is also temporary. But unlike the party safeguarded by a protective order, a recipient of alimony *pendente lite* must be a party to a pending action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce. N.C. Gen. Stat. Sec. 50-16.3 (1984).

North Carolina General Statute Section 50B-6 specifically states, "This Chapter shall not be construed as granting a status to any person for any purpose other than those expressly stated herein." There is no mention in Chapter 50B of legal separation. The legislature obviously did not intend for Chapter 50B protective orders to change marital status or to affect legal obligations such as the one in the case at bar.

We affirm the judgment of the trial court and hold that Carol Benfield was not legally separated at the time of her husband's death. She is entitled to the insurance proceeds.

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**Hitchcock v. Cullerton**

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Affirmed.

Judges JOHNSON and COZORT concur.

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WALTER L. HITCHCOCK v. KATHLEEN A. CULLERTON

No. 8518SC1388

(Filed 5 August 1986)

**Malicious Prosecution § 13— sufficiency of evidence**

The trial court erred in directing a verdict for defendant in plaintiff's action for malicious prosecution where plaintiff showed that defendant had instituted a criminal proceeding against him which was terminated in his favor; in that proceeding plaintiff was charged with communicating threats; plaintiff's evidence tended to show that he had never made the threatening statement in question to defendant and he thus raised the jury question as to whether probable cause existed; and plaintiff presented sufficient evidence from which malice could be inferred.

APPEAL by plaintiff from *John, Judge*. Judgment entered 24 July 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 2 June 1986.

*Douglas, Ravenel, Hardy, Crikfield & Lung by Robert D. Douglas, III, for plaintiff appellant.*

*No counsel contra.*

COZORT, Judge.

The plaintiff instituted this action for malicious prosecution seeking to recover damages of \$20,250.00 from the defendant. At trial the plaintiff presented evidence tending to show that on 25 June 1982 plaintiff and defendant, his neighbor, engaged in a verbal exchange concerning plaintiff's construction of a fence on his property which abutted the defendant's property. Subsequent to the exchange plaintiff was arrested on a warrant sworn out by the defendant alleging that plaintiff "did unlawfully and willfully threaten to physically injure the person of Kathleen A. Cullerton," the defendant here, on 25 June 1982. On 10 August 1982, the charge was dismissed by the District Attorney of Guilford Coun-



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**Hitchcock v. Cullerton**

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ty. The plaintiff testified that he did not communicate any threats to the defendant. After plaintiff presented his evidence, the defendant moved for a directed verdict which the trial court granted. The plaintiff appealed assigning error to the trial court's granting of the motion for a directed verdict and arguing that he presented sufficient evidence of each element of malicious prosecution to require submission of the case to the jury. We agree with the plaintiff and reverse the trial court.

The purpose of a motion for a directed verdict is to test the legal sufficiency of the evidence. G.S. 1A-1, Rule 50(a); *Wallace v. Evans*, 60 N.C. App. 145, 298 S.E. 2d 193 (1982). The evidence must be taken in the light most favorable to the plaintiff. *Farmer v. Chaney*, 292 N.C. 451, 233 S.E. 2d 582 (1977). Contradictions, conflicts, and inconsistencies in the evidence must be drawn in the plaintiff's favor. *Tripp v. Pate*, 49 N.C. App. 329, 271 S.E. 2d 407 (1980). The question presented on appeal is whether the evidence taken in the light most favorable to plaintiff is sufficient for submission of the case to the jury.

To establish malicious prosecution the plaintiff must show that the defendant instituted or caused to be instituted against him a criminal proceeding, with malice and without probable cause and that such proceeding was terminated in the plaintiff's favor. *Jones v. City of Greensboro*, 51 N.C. App. 571, 588, 277 S.E. 2d 562, 573 (1981). An action for malicious prosecution must be based on valid process. *Bassinov v. Finkle*, 261 N.C. 109, 134 S.E. 2d 130 (1964). The warrant must allege all the elements of the crime charged. *Id.*

The warrant in this case clearly and accurately alleged the crime charged. The defendant was arrested on a warrant which charged him with communicating threats. The warrant stated that "the defendant . . . did unlawfully and willfully threaten to physically injure the person . . . of Kathleen A. Cullerton. The threat was communicated to the person by Walter L. Hitchcock stating that if you will go and put on mans [sic] clothes and come back out Ill will [sic] Beat You Up . . . and Ill [sic] Take Care of You and the threat was made in a manner and under circumstances which would cause a reasonable person to believe that the threat was likely to be carried out and the person threatened believed that the threat would be carried out, in violation of G.S.

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Hitchcock v. Cullerton

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14-277.1." The warrant alleges all the constituent elements of the crime of communicating threats and thus amounts to valid process. Cf. *Jones, supra* (no crime alleged in warrant, merely facts which did not constitute any crime).

Whether probable cause exists is a question for determination for the jury. *Taylor v. Hodge*, 229 N.C. 558, 560, 50 S.E. 2d 307, 308-09 (1948). The test for determining want of probable cause in an action for malicious prosecution is whether a man of ordinary prudence and intelligence under the circumstances would have known that the charge had no reasonable foundation. *Bryant v. Murray*, 239 N.C. 18, 79 S.E. 2d 243 (1953). Plaintiff's evidence tended to show that he never made the threatening statement to the defendant. Plaintiff's evidence indicated that a hostile attitude had developed between plaintiff and defendant over the plaintiff's erection of a fence on his property. A confrontation between the plaintiff and defendant did occur on the 25th of June; however, plaintiff's evidence indicated that the defendant did most of the threatening. Plaintiff's evidence, taken in the light most favorable to him, tends to show a lack of probable cause to issue the warrant, in that he denies ever making the statement alleged in the warrant.

Malice may be inferred from the lack of probable cause and the conduct of the defendant. *Taylor v. Hodge, supra*. The evidence taken in the light most favorable to the plaintiff establishes a hostile attitude between the parties and want of probable cause. Thus, plaintiff presented sufficient evidence from which malice could be inferred.

Having examined the record, we hold that the evidence presented by the plaintiff, when considered in the light most favorable to the plaintiff, is sufficient to require submission to the jury of the claim for malicious prosecution. The trial court erred by directing a verdict for the defendant.

Reversed.

Chief Judge HEDRICK and Judge EAGLES concur.

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State v. Myers

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STATE OF NORTH CAROLINA v. JOHNNIE ALTON MYERS

No. 861SC165

(Filed 5 August 1986)

**Constitutional Law § 34— robbery with dangerous weapon—violation of state and federal statutes—two trials—no double jeopardy**

Defendant could properly be tried for robbery with a dangerous weapon in violation of N.C.G.S. § 14-87, though he had previously been tried and convicted of robbery with a dangerous weapon in violation of 18 U.S.C. § 2113(d) and though both charges arose from the same transaction, since the act committed was the same in both cases, but the offense was not, and it was no bar to prosecution that defendant had already been punished for the same act by another sovereign.

APPEAL by the State from *Barefoot, Judge*. Order entered 9 October 1985 in Superior Court, PERQUIMANS County. Heard in the Court of Appeals 6 June 1986.

*Attorney General Thornburg, by Assistant Attorney General John H. Watters, for the State.*

*Edwards & Edwards, by Walter G. Edwards, Jr., for defendant appellee.*

PHILLIPS, Judge.

In the United States District Court for the Eastern District of North Carolina defendant has been indicted, tried, convicted and sentenced for robbing the Peoples Bank and Trust Company in Hertford, North Carolina of \$6,058 with a dangerous weapon on 4 April 1985 in violation of 18 U.S.C. Sec. 2113(d). In this case defendant stands indicted in the Superior Court of Perquimans County for committing the same robbery with a dangerous weapon in violation of G.S. 14-87. Upon defendant's motion the trial court dismissed the indictment upon the ground that its prosecution would violate the Fifth Amendment to the United States Constitution and Art. I, Sec. 19 of the North Carolina Constitution by again putting defendant in jeopardy for an offense that he has already been punished for. The order was erroneously entered and we reverse it. Defendant is not being prosecuted in this case for the "same offense" that he has been punished for in the federal court. In that case defendant was prosecuted and punished for

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**State v. Myers**

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an offense against the laws of the United States of America; in this case he is being prosecuted for an offense against the laws of the State of North Carolina. Though the act committed is the same in both cases, the *offense* is not. In its legal signification, of course, an *offense*, or crime, is not merely a bad act of some kind, it is the violation of a *law*. *Moore v. Illinois*, 14 How. 13, 14 L.Ed. 306 (1852). All sovereign states, and it is fundamental to our system of government that the United States of America and the various states are separate, distinct sovereign states, have the power to enact laws and prosecute those who violate them; and it is no bar to a prosecution that the offender has already been punished for the same act by another sovereign. *Heath v. Alabama*, 474 U.S. ---, 88 L.Ed. 2d 387, 106 S.Ct. 433 (1985); *United States v. Wheeler*, 435 U.S. 313, 55 L.Ed. 2d 303, 98 S.Ct. 1079 (1978); *Bartkus v. Illinois*, 359 U.S. 121, 3 L.Ed. 2d 684, 79 S.Ct. 676, *reh. denied*, 360 U.S. 907, 3 L.Ed. 2d 1258, 79 S.Ct. 1283 (1959); *United States v. Lanza*, 260 U.S. 377, 67 L.Ed. 314, 43 S.Ct. 141 (1922); *State v. Lassiter*, 198 N.C. 352, 151 S.E. 721 (1930).

Reversed.

Judges MARTIN and PARKER concur.

## CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 AUGUST 1986

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| D.E.U. ENTERPRISES v.<br>WHITELINE, INC.<br>No. 8528SC1387                        | Buncombe<br>(84CVS1137)                         | Affirmed   |
| EASTERN CAROLINA<br>WAREHOUSE OF<br>GOLDSBORO, INC.<br>v. MALPASS<br>No. 868SC111 | Wayne<br>(83CVS2047)                            | Affirmed   |
| HANCOCK, INC. v. KIBLER<br>No. 8527DC1257   | Gaston<br>(85CVD264)<br>originally<br>(85CVM97) | Affirmed   |
| HAYES v. HAYES<br>No. 8621DC102   | Forsyth<br>(84CVD4540)                          | Vacate the order of<br>17 December 1985<br>but affirm the<br>order dated 26<br>September 1985. |
| IN RE WIGGINS<br>No. 8620SC199  | Stanly<br>(85CVS147)                            | Affirmed   |
| KATSOS v. DASKAL<br>No. 8520SC940   | Moore<br>(82CVS384)                             | Affirmed   |
| LEWIS v. WEYERHAEUSER<br>COMPANY<br>No. 853SC1090                                 | Carteret<br>(83CVS747)                          | Affirmed   |
| OWENSBY v. OWENSBY<br>No. 8527DC1330  | Cleveland<br>(81CVD1012)                        | Affirmed in part;<br>vacated in part,<br>and remanded.   |
| STATE v. BULLOCK<br>No. 8514SC1122  | Durham<br>(84CRS46680)                          | No Error   |
| STATE v. COLEY<br>No. 856SC1188   | Halifax<br>(85CRS6344)<br>(85CRS6345)           | New Trial  |
| STATE v. FIELDS<br>No. 8518SC1239   | Guilford<br>(84CRS077384)                       | No Error   |
| STATE v. GRAY<br>No. 867SC61  | Nash<br>(84CRS12731)<br>(84CRS12732)            | No Error   |

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| STATE v. HARTLEY<br>No. 8527SC1329              | Cleveland<br>(85CRS4542)  | Remanded for<br>resentencing.                     |
| STATE v. HEATH<br>No. 8620SC142                 | Union<br>(85CRS5104)  | No Error  |
| STATE v. RANSOM<br>No. 8516DC1139               | Robeson<br>(85CRS2900)  | No Error  |
| STATE v. SCALES<br>No. 8517SC1344               | Surry<br>(85CRS1998)<br>(85CRS2000)<br>(85CRS2001)<br>(85CRS2002)<br>(85CRS2003)<br>(85CRS1999) | No Error<br><br><br><br><br><br>Judgment Arrested |
| STATE v. STRONG<br>No. 8628SC77                 | Buncombe<br>(85CRS8950)   | No Error  |
| WATKINS v. URBAN<br>No. 8626DC98                | Mecklenburg<br>(83CVD12200)   | No Prejudicial<br>Error                           |
| WIELAND v. WOOLARD<br>No. 8610SC35              | Wake<br>(84CVS4066)   | Reversed and<br>Remanded                          |
| WILLIAMSON v. WILLIAMSON<br>No. 8619DC67        | Randolph<br>(83CVD1106)   | Affirmed  |
| WOOTEN v. BRAND-REX<br>COMPANY<br>No. 8628SC105 | Buncombe<br>(84CVS2909)   | Affirmed  |

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**Britt v. Britt**

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BETSY BRACY BRITT AND ROBERT DIXON BRITT v. BILLY B. BRITT AND PEGGY G. BRITT, JOINTLY AND SEVERALLY, AND MAGNOLIA HILL, INC.

No. 8515SC1044

(Filed 5 August 1986)

**1. Quasi Contracts and Restitution §§ 1.1 and 1.2— implied contract and quasi contract— sufficiency of evidence**

In an action arising from the purchase of a farm by defendants and the operation of the farm by plaintiffs, the trial court erred by denying defendants' motions for a directed verdict and for a judgment n.o.v. where, although there was considerable confusion over the theories under which plaintiffs were proceeding, plaintiffs contended that the facts gave rise to an implied contract and *quantum meruit*; plaintiffs admitted in their brief the existence of a special agreement between the parties, which defeats a claim for implied contract; and there was insufficient evidence to answer the key question of the parties' ownership interest in and relationship to the property so that plaintiffs' proof of value unjustly retained and realized by defendants was defective.

**2. Fraud § 12— promise to accrue stock in corporation in return for labor and mortgage payments— evidence of fraud insufficient**

The trial court erred by denying defendants' motion for a directed verdict on a claim for fraud where plaintiff alleged that defendant had agreed to accrue stock for her in a corporation but there was no evidence of material misrepresentation in that plaintiff's evidence merely established a nebulous inquiry by defendant which was at best a promise of future intent; there was nothing to give rise to an inference that defendant intended for plaintiff to do anything in reliance upon the conversation; and there was no evidence that plaintiff in any way changed her position or suffered any injury from the alleged representation.

APPEAL by defendants from *Bowen, Judge*. Judgment entered 6 February 1985 in Superior Court, ORANGE County. Heard in the Court of Appeals 11 March 1986.

On 29 April 1983, plaintiff Betsy Britt filed her original complaint against defendants Billy B. Britt, Peggy G. Britt and Magnolia Hill, Inc. In Count I of her complaint, plaintiff alleged that she had equitable title to Magnolia Hill Farm and defendants Billy B. Britt and Peggy G. Britt held legal title to Magnolia Hill Farm in trust for her. On 20 October 1983, plaintiff, pursuant to Rule 19, N.C. Rules Civ. P., moved the court to join as a party plaintiff, her husband, Robert Dixon Britt. Robert Dixon Britt is the brother of defendant Billy Britt. There were numerous pre-trial motions, amendments to plaintiff's complaints, and counterclaims

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**Britt v. Britt**

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made by defendant. On 5 January 1985, the parties stipulated to the following issues to be tried.

Plaintiff's Case

*Issue #A:* Do the facts and circumstances require the imposition of a parol trust on the real property and improvements known as Magnolia Hill Farm for the benefit of the plaintiff, Betsy Britt?

*Issue #B:* Have the defendants, Billy B. Britt, Peggy G. Britt and or Magnolia Hill, Inc. been unjustly enriched by the plaintiff, Betsy Britt's expenditure of money and labor for the reduction of mortgage, principal and interest, repair, maintenance, and improvement of the real property and improvements known as Magnolia Hill Farms, requiring an award of compensatory damages to the plaintiff Betsy B. Britt, and if so what amount of damages are recoverable by the plaintiff?

*Issue #C:* Did the defendants, Billy B. Britt, and or Peggy G. Britt willfully defraud or conspire to defraud and in fact defraud the plaintiff Betsy B. Britt by promising her she would acquire stock in Magnolia Hill, Incorporated corresponding to the value of payments by Betsy B. Britt on the notes secured by first and second deeds of trust on the real property and improvements known as Magnolia Hill Farms, requiring an award of compensatory damages for the plaintiff, Betsy B. Britt? If so, did the defendant's fraudulent representation damage the plaintiff Betsy Britt and if so, in what amount was the plaintiff damaged? Does the conduct of defendants Billy B. Britt and Peggy G. Britt or either of them justify an award of punitive damages?

*Issue #D:* Did Peggy G. Britt and/or Billy B. Britt and/or Robert Britt conspire to fraudulently induce plaintiff, Betsy Britt to continue to make the mortgage payments on Magnolia Hill Farm, as well as to make or continue to make repairs, maintenance and improvements to Magnolia Hill Farm, and provide her labor and services? If so, was the plaintiff Betsy Britt damaged by any acts committed by the defendants Billy B. Britt and/or Peggy G. Britt in furtherance of the conspiracy? If so, in what amount was the plaintiff Betsy Britt damaged? Does the conduct of the defendants Billy B. Britt



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**Britt v. Britt**

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or Peggy G. Britt or either of them justify an award of punitive damages?

Defendant's Case in Defense

*Issue #1: Failure to satisfy condition*

Have Betsy B. Britt and Robert D. Britt failed to satisfy all conditions precedent to their obtaining title to Magnolia Hill Farm within a reasonable time?

*Issue #2: Statutes of Limitations*

Are the claims of Betsy B. Britt and Robert D. Britt barred in part, by the applicable statutes of limitation?

*Issue #3: Fraud in the Inducement*

Did Betsy B. Britt and Robert D. Britt fraudulently induce Billy B. Britt into putting them into possession of Magnolia Hill Farm?

*Issue #4: Conditions Precedent; Mutuality of Obligation*

Have Betsy B. Britt and Robert D. Britt fulfilled all their obligations to Billy B. Britt and Peggy G. Britt, the performance of which are conditions precedent to the rendering of any performance of any obligations by Billy B. Britt and Peggy G. Britt to Betsy B. Britt and Robert D. Britt.

*Issue #5: Unclean Hands*

Are the claims of Betsy B. Britt and Robert D. Britt barred by their own inequitable conduct?

Defendants' Case in Counterclaim

*Issue #1: Fraud in the Inducement*

Did Betsy B. Britt and Robert D. Britt proximately cause damage to Billy B. Britt and Peggy G. Britt? If so, in what amount?

*Issue #2: Breach of Agreement*

Have Betsy B. Britt and Robert D. Britt breached an agreement with Billy B. Britt and Peggy G. Britt (a) to pay all debt service, taxes and insurance premiums on account of Billy B.

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**Britt v. Britt**

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Britt and Peggy G. Britt, (b) to maintain, repair and preserve Magnolia Hill Farm and its improvements in good condition, and (c) to pay Billy B. Britt and Peggy G. Britt an additional sum of \$1,000.00 per month as rent? If so, what damages have been sustained by Billy B. Britt and Peggy G. Britt as a proximate result of the breach?

*Issue #3: Conversion*

Has Betsy B. Britt willfully converted to her own use certain personalty owned by defendants? If so, what damages have been sustained by defendants as a proximate result of the conversion?

*Issue #4: Unjust Enrichment*

Did defendants provide Betsy B. Britt and/or Robert D. Britt with a residence and means of livelihood under such circumstances that Betsy B. Britt and Robert D. Britt should be required to reimburse defendants? If so, what amount(s) are defendants entitled to recover from Betsy B. Britt and Robert D. Britt?

. . . .

Plaintiff's Case in Defense of Defendants' Counterclaims

*Issue #2:* Is the defendants' claim for rent in the amount of \$1,000.00 per month barred by the statute of fraud[s], the statute of Limitations, and Laches? If any agreement existed requiring the plaintiffs Betsy Britt, and Robert Dixon Britt to pay all debt service, taxes and insurance premiums on account of Billy B. Britt and Peggy G. Britt, is defendants' claim barred by waiver, laches, and equitable estoppel?

*Issue #3:* Is defendants' claim for conversion barred by the applicable statute of limitations?

*Issue #4:* Is defendants' claim for unjust enrichment barred by defendants' failure to plead facts and circumstances sufficient to raise such claim? Is defendants' claim for unjust enrichment barred by waiver, laches, and equitable estoppel?

On 28 January 1985, this case was tried before a jury. Defendants moved for directed verdicts on all claims after plaintiff's

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**Britt v. Britt**

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presentation of evidence and renewed said motion at the close of all the evidence. The trial court denied defendants' motions. The trial court submitted to the jury plaintiffs issues of parol trust, unjust enrichment and fraud. Defendants' counterclaims were not submitted to the jury.

On 6 February 1985, the jury returned with its verdict. The jury answered the parol trust issue in favor of defendants, but awarded plaintiff \$363,616.00 for her unjust enrichment claim. On the fraud issue plaintiff was awarded \$1.00 in nominal damages and \$400,000.00 in punitive damages. The total amount awarded to plaintiff was \$763,617.00. On 15 February 1985, defendants moved the court for entry of judgment notwithstanding the verdict and, in the alternative, for a new trial. On 18 March 1985, the trial court denied defendants' motions. Defendants appeal.

*Boyce, Mitchell, Burns & Smith, P.A., by Carole S. Gailor and Susan K. Burkhardt, for plaintiff appellee.*

*Jordan, Brown, Price & Wall, by Charles Gordon Brown and William D. Bernard; Ward & Smith, P.A., by Robert D. Rouse, Jr., and Donald T. Ellington, for defendant appellants.*

JOHNSON, Judge.

The facts of this case are greatly in dispute. However, an understanding of the relationship of the parties was established by the evidence as follows:

Plaintiff met Robert Britt on New Year's eve 1976 in Little Rock, Arkansas at a night club where Robert was performing with a band of musicians. Plaintiff was then married to her ex-husband, David Ray. After taking several trips together, plaintiff agreed to move to North Carolina where Robert lived. In 1977, plaintiff moved to North Carolina and brought with her a Chevrolet Blazer, a horse trailer, a horse, her saddle, some tack, and approximately \$630.00 in cash. When plaintiff arrived in Chapel Hill, North Carolina she rented an apartment in her own name, whereupon Robert Britt moved in with her. In order to avoid aggravating past differences with his brother, defendant Billy Britt, Robert Britt told him that plaintiff and he were married. Plaintiff wore a wedding band and referred to herself as Betsy Britt.

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**Britt v. Britt**

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Robert Britt and defendant Billy Britt had disagreed before about Robert sleeping with women out of wedlock.

Defendant Billy Britt employed plaintiff in his Amway business and also sponsored her and Robert as Amway distributors. Plaintiff secured employment with a local stable operation, but her employment was terminated by the owner. At this time defendant Billy Britt was considering the purchase of Magnolia Hills Farm. In July 1977, defendant Billy Britt proposed to his brother that he would purchase the Magnolia Hills Farm and that when plaintiff and Robert achieved the necessary volume of sales to "hit diamond," he would allow them to purchase the farm. On 9 August 1977, defendant Billy Britt purchased Magnolia Hills Farm and the farm equipment thereon. Plaintiff and Robert Britt took residence on the farm. There has been an equestrian center existing on Magnolia Hills Farm since 1972. In July 1977, plaintiff became pregnant. During this time period plaintiff obtained a divorce from David Ray. On 26 October 1977, unbeknown to defendant Billy Britt, plaintiff and Robert Britt were married in a secret ceremony that took place in Dillon, South Carolina. In August 1977, defendant Billy Britt delivered a mortgage loan payment book to plaintiff whereupon she began making mortgage payments from the proceeds received from the stable operation, which was known as Magnolia Hills Stable. Plaintiff and Robert Britt had a stormy marriage. In March 1983, plaintiff obtained a domestic violence order to restrain Robert Britt from coming upon Magnolia Hills Farm. Defendant Billy Britt asked plaintiff to leave the farm, whereupon she refused to leave and instituted her lawsuit.

In the record on appeal defendants list seventy-six (76) assignments of error and one hundred six (106) exceptions pertaining to the trial court's rulings on evidentiary matters, motions, and jury instructions. However, defendants do not discuss fifteen (15) of their assignments of error in their brief and therefore they are deemed abandoned. Rule 28(a), N.C. Rules App. P.

[1] Defendants assign error to the trial court's denial of their motions for a directed verdict and for judgment notwithstanding the verdict. Defendants contend that the evidence was insufficient to support plaintiff's claims of unjust enrichment and fraud. The purpose of a motion for a directed verdict, pursuant to Rule 50,

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**Britt v. Britt**

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N.C. Rules Civ. P., is to test the legal sufficiency of the evidence to take the case to a jury and to support a verdict for plaintiffs. In passing upon a motion for a directed verdict, the trial court must consider the evidence in the light most favorable to the non-movant. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). In our review of the trial court's ruling on defendants' motion we must also consider the evidence in the light most favorable to the non-moving party. *Wilson v. Bob Robinson's Auto Serv., Inc.*, 20 N.C. App. 47, 200 S.E. 2d 393 (1973). Bearing these principles in mind we now turn to our review of the trial court's rulings upon defendants' motions for directed verdict on plaintiff's claim based on the equitable doctrine of unjust enrichment.

The doctrine of unjust enrichment has been stated as follows:

When a party to a special contract, unenforceable by reason of the statute of frauds, expends money as contemplated by the contract, and the other party to the contract consciously receives or accepts the benefits thereof and then fails or refuses to perform his part of the special contract, the law implies a promise and obligation to repay the money so expended.

*Wells v. Foreman*, 236 N.C. 351, 354, 72 S.E. 2d 765, 767 (1952). The Court in *Wells, supra*, went on to state the necessary allegations of unjust enrichment as follows:

Thus it was necessary for plaintiffs to plead the special contract and defendant's breach thereof as a basis for the recovery of the money depended in reliance thereon. This includes the allegation of the essential facts and circumstances which (1) prompted the parties to enter into the contract; (2) induced the plaintiffs to make the payments on the mortgage indebtedness and expend money in the repair and improvements of the premises; (3) disclose the conscious acceptance by the benefits thereof; and (4) constitute a breach of the special contract by defendant.

*Id.*, at 354, 72 S.E. 2d at 767.

Defendants first argue that plaintiff Betsy Britt did not have a reasonable expectation of compensation. Defendants' argument suffers from the blurring of the substantive aspect of unjust enrichment and the measure of damages for unjust enrichment;

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**Britt v. Britt**

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this is understandable in light of the requirement of proof of damages associated with plaintiff's claims. There appears to have been considerable confusion during trial as to what theories plaintiff was proceeding under and what evidence was applicable to the elements for a parol trust, fraud, and unjust enrichment. The trial court repeatedly analogized the case *sub judice* to an action for recovery upon the theory of improvements under the betterments statute, G.S. 1-340. However, defendants' first argument seems to stem from *Stout v. Smith*, 4 N.C. App. 81, 165 S.E. 2d 789 (1969), wherein this Court explains the various possible measure of damages for claims whereby a party invokes the doctrine of unjust enrichment. The Court set forth that explanation as follows:

There is a difference between the measure of damages in a claim on express contract, one on implied contract, and one on *quantum meruit*. 'A promise to pay for services is implied when they are rendered and received in such circumstances as authorize the party performing to entertain a reasonable expectation of payment for them by the party benefited. However, the law will not imply a promise to pay the value of services rendered and accepted, where there is proof of a special agreement to pay therefor a particular amount or in a particular manner . . .' 'If there is no special agreement as to the amount of compensation and the services are not intended to be gratuitous, the law implies a promise by the employer to pay what services reasonably are worth, which is determined largely by the nature of the work and the customary rate of pay for such work in the community and at the time the work was performed.' 'The measure of recovery for services furnished or goods received under the doctrine of unjust enrichment, as distinguished from the doctrine of contracts implied in fact is the value of the actual benefit realized and retained.'

*Id.* at 84, 165 S.E. 2d at 791-92 (emphasis supplied) (citations omitted).

What exaggerated the parties' and the court's confusion at trial was plaintiff's contention, as stated in her brief, that "the facts in this case give rise to *two theories* of recovery for unjust enrichment: contract implied in fact and contract implied at law

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Britt v. Britt

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or *quantum meruit*." (Emphasis supplied.) The distinctions drawn between the two theories, as can be seen from *Stout, supra*, are not mere technicalities and may not be ignored. We note the importance of this area of confusion at trial because it also permeates the parties' arguments in this appeal. Moreover, the confusion manifested itself in the trial court's instruction to the jury on the standard of proof. The two theories have distinct elements that must be proved, the measure of damages are different, and a directed verdict may be appropriate on one claim, but not on the other. From our review of the voluminous transcript, the record on appeal, and the parties' briefs, this approach in the presentation of the evidence was not followed at trial.

Plaintiff contends that the facts and circumstances give rise to the two theories, (1) implied in fact contract, and (2) quantum meruit; however, plaintiff does not separately argue the sufficiency of the evidence in connection with each of said theories and did not provide the jury with sufficient evidence to support its verdict. Defendants, in their brief, also make a broad argument against the sufficiency of the evidence to withstand their motion. Intent is disregarded in the case of contracts implied in law and "the liability exists from an implication of law that arises from the facts and circumstances independent of agreement or presumed intention." 66 Am. Jur. 2d *Restitution and Implied Contracts* sec. 2 (1973). In the case of contracts implied in law or more properly called quasi-contracts, "the promise is purely fictitious and is implied in order to fit the actual cause of action to the remedy." *Id.* As will be discussed *infra*, there was evidence from which the jury could deduce the existence of an agreement between the parties; however, the evidence was insufficient for a jury to find that defendant Billy Britt impliedly promised plaintiff that he would compensate her for her services and improvements to the farm if she did not "hit diamond." With one exception, plaintiff, in her brief, quotes with approval defendants' characterization of the special agreement, which viewed in the light most favorable to the plaintiff was as follows:

Billy had promised that the farm would change hands when Betsy and Bobby 'hit diamond.' R. p. 3, paragraph (6). In exchange for keeping the place repaired and maintained (T pp. 45, 51-52, 589-590, 607, 716-718) and operating the stable business to carry the farm (T pp 53, 581, 629-630, 633-634,

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**Britt v. Britt**

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726-727), Betsy and Bobby were to live there free and keep any surplus income (Tp726). This was the *bargain between the parties*.

(Emphasis in defendants' brief.) Plaintiff, in her brief, admits to the existence of this agreement as follows:

The defendants' description of the parol agreement is consistent with Betsy Britt's own testimony, except that it omits the agreement to repay Defendants for what they 'had in it' (T. p. 46). The plaintiff's other witnesses confirmed the existence of and terms of the agreement.

The presence of this agreement defeats plaintiff's claim on a contract implied in law. *Stout, supra*.

There are no terms of the alleged agreement from which it may be inferred that defendants would compensate plaintiff for improvements to the farm and for her services if she failed to meet the condition precedent of "hitting diamond." In fact, the agreement provides for compensation in terms of plaintiff living rent free and receiving any surplus income in exchange for her services. The evidence showed that with defendants' sponsorship, plaintiff developed an Amway business (B & B Enterprises), that grossed over \$500,000.00 in 1982. The evidence in the case *sub judice*, even when viewed in the light most favorable to plaintiff, showed that Magnolia Hills Farm served as a showcase, meeting place, warehouse, and distribution center for her Amway business. Plaintiff argues that defendants' agreement to convey the farm induced them into making mortgage payments and expend funds for the repair and maintenance of the premises. As discussed, *supra*, testimony with respect to the terms of the parol agreement does not support her argument. Moreover, even when viewed in the light most favorable to plaintiff, the evidence adduced at trial did not establish that plaintiff expended her funds to make mortgage payments or repair the premises. The key question, which there was insufficient evidence to answer, is, what are the parties' ownership interests in and relationship to Magnolia Hills Stables, Inc. and Magnolia Hill, Inc. The evidence taken in the light most favorable to plaintiff showed that when plaintiff took residence on the farm there was an equestrian center on the premises of Magnolia Hills Farm which had existed since 1972; that plaintiff offered a different form of riding instruc-



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**Britt v. Britt**

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tion when she took residence on the farm; that many of the old clientele did not take their business elsewhere; that defendant Billy Britt provided over \$7,000.00 for the initial capitalization for the stable operation; that all losses and income flowing from the stable operation were reported on defendant Billy Britt's income tax returns.

If plaintiff was the owner of the stable operation then she would not be entitled to the value of her services estimated by her expert witness to have a value of \$224,415.00 to \$338,833.00. If plaintiff were not the owner of the stable operation she would not be entitled to recover the \$98,126.00 paid as mortgage payments since the funds were taken from the proceeds of the stable operation. The insufficiency of the evidence led to a myriad of errors with respect to the damages awarded plaintiff which need not be specifically addressed because more importantly the question of the ownership of the stable operation points out a glaring defect in plaintiff's proof of any value unjustly retained and realized by defendants.

Plaintiff maintains that she "performed, in all respects, in accordance with the parol agreement, the proper measure of damages is the reasonable value of her services and expenditures." As stated above, plaintiff would not be entitled to recover the \$98,126.00 paid as mortgage payments since the funds were taken from the proceeds of the stable operation. Moreover, as defendants contend, plaintiffs were tenants at sufferance. Their agreement to live on the premises of Magnolia Hills Farm, though it may have assisted their efforts to "hit diamond," was completely separate and apart from the agreement that if they "hit diamond" defendants would be comfortable with conveying title to the farm since plaintiffs, by their achievement of diamond status, would be financially stable enough to purchase the farm. The parties agreed on compensation in the form of "any surplus income."

Defendants further contend that plaintiff failed to prove the amount by which the value of Magnolia Hills Farm was enhanced by reason of her labor and expenditures. We agree. Plaintiff presented evidence that \$40,460.99 were expended by her in making improvements, repairs and for maintenance at the farm. Assuming *arguendo* without conceding the fact that the \$40,460.99 was expended from plaintiff's funds, there is still no proof of enhanced

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**Britt v. Britt**

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value because the measure of recovery is not the cost of repairs. Long ago in *Jones v. Sandlin*, 160 N.C. 150, 75 S.E. 1075 (1912), the North Carolina Supreme Court rejected costs of improvements sought in an equitable action. The Court stated the following:

The general rule is that if one is induced to improve land under a promise to convey the same to him, which promise is void or voidable, and after the improvements are made he refuses to convey, the party thus disappointed shall have the benefit of the improvements to the extent that they increased the value of the land. . . . The recovery is based not upon the costs of the improvements, but upon the enhanced value of the property. *Weterell v. Gorman*, 74 N.C. 603, in which *Justice Reade* says: 'The value of the improvements to the premises is undoubtedly the correct rule, for very expensive repairs might injure rather than improve them.'

*Id.* at 154, 75 S.E. at 1077 (citations omitted). We hold that the trial court erred in denying defendants' motions for a directed verdict on plaintiff's claims of contract implied in fact and quantum meruit.

[2] Defendants next argue that their motion for a directed verdict on plaintiff's claim for fraud should have been allowed due to the insufficiency of the evidence. We agree.

The elements of an actionable case of fraud that plaintiff should have proved at trial are as follows:

(a) that defendant made a representation relating to some material past or existing fact; (b) that the representation was false; (c) that defendant knew the representation was false when it was made or made it recklessly without any knowledge of its truth and as a positive assertion; (d) that defendant made the false representation with the intention that it should be relied upon by plaintiffs; (e) that plaintiffs reasonably relied upon the representation and acted upon it; and (f) that plaintiffs suffered injury.

*Johnson v. Phoenix Mutual Life Insurance Co.*, 300 N.C. 247, 253, 266 S.E. 2d 610, 615 (1980). "As a general rule, a mere promissory misrepresentation will not support an action for fraud." *Braun v. Glade Valley School, Inc.*, 77 N.C. App. 83, 87, 334 S.E. 2d 404, 407

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**Britt v. Britt**

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(1985). "The rule is that fraud cannot be based on an allegation of a promise of future intent." *Id.* "Here proof of nonperformance is not sufficient to establish the fraudulent intent." *Williams v. Williams*, 220 N.C. 806, 810, 18 S.E. 2d 364, 367 (1941).

Our first line of inquiry is with respect to the sufficiency of plaintiff's evidence that defendant Billy Britt made a misrepresentation relating to some past or existing material fact. Plaintiff, in her brief, contends that "the evidence presented at trial establishes that defendant Billy Britt not only offered to accrue stock on plaintiff's behalf in Magnolia Hill, Inc., he *agreed* to do so." (Emphasis in original.) Plaintiff's testimony regarding defendant Billy Britt's alleged misrepresentation of a material past or existing fact was, in pertinent part, as follows:

Q. Did you ever, state whether or not you ever approached Bill Britt with regard to putting your agreement in writing (the alleged original agreement as set forth *supra*)?

A. Yes.

Q. When was the first time you did that?

A. I believe it was either December of '78 or January of '79.

Q. What was the, [sic] did you have a conversation with him?

A. Yes.

Q. And what was the conversation?

A. I was on the telephone at my house. It was a telephone conversation. And I had told him that since I was now making the mortgage payments that I felt that I needed something in writing. This was under the advice of my father. When I told him what I was doing and what the arrangement was he said, Betsy you had better get something in writing. So I talked, I called Bill I think and told him that I really wanted something in writing, and he said that that wasn't going to happen; and he said well maybe, I said, 'I'm putting all this money in the farm and well maybe, I said, 'I'm putting all this money in the farm and all and I'd like some kind of protection. He said, maybe we'll just make you an employee or something. And at that point, I had already put money in the farm and I didn't really want to be an employee from that

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**Britt v. Britt**

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point on; and I knew that the farm based on the what the mortgage payments there was no way that I could be paid because everything I was making, I was putting back into the farm so I said, 'No I don't want to do that.' And he said, well we'll work it out.' And I said, 'How will we work it out?' He said, 'Well,' he said, 'I'm forming a corporation and how would you feel about having accruing stock in the corporation each time you made a mortgage payment, then you would be accruing more stock?' So I thought well stock is paper, you know, and *I assumed though that the stock was relative to the property, relative to the actual real estate.* And I didn't know much about stock or anything; but I knew that there would be something on paper; and so I was satisfied with that.

(Emphasis supplied.) Plaintiff further testified that she did nothing different than she had done prior to the alleged conversation. Moreover, plaintiff testified that it was her assumption that the stock related to the real estate. However, plaintiff's testimony shows that this assumption was not warranted. Nothing in plaintiff's testimony about defendant's alleged statements establishes a representation. Defendant Billy Britt denied that he promised plaintiff that she would accrue stock in a corporation that he was forming. Nonetheless, viewing plaintiff's testimony in the light most favorable to her by assuming *arguendo* that the alleged conversation was as she testified, there is still insufficient evidence of a material misrepresentation of a past or existing fact. Plaintiff's testimony merely establishes a nebulous inquiry made by defendant. The statement attributed to defendant pertained to a corporation that was not yet formed. There was nothing in the statement by which plaintiff or the jury could infer a relationship between the corporation not yet formed and the Magnolia Hills Farm. There was nothing in the statement from which it could be inferred that plaintiff would acquire an ownership interest in the farm through accrual of stock. Plaintiff, as discussed *supra*, did not establish what corporation was the corporation defendant was allegedly forming. Even if Magnolia Hill, Inc. was the corporation plaintiff was allegedly supposed to accrue stock in, there was no connection between that corporation and the farm except that there were allegations that Magnolia Hill, Inc. was an incorporation of the stable operation at the farm. Magnolia Hill, Inc. did

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Britt v. Britt

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not hold the deed of Magnolia Hills Farm as one of its assets. There were no terms discussed with respect to the value of stock, the amount of stock plaintiff would accrue with each mortgage payment, or when the alleged accrual would begin. As discussed *supra*, plaintiff did not prove the mortgage payments, by virtue of which she claims she was defrauded, were paid from her funds. The lack of proof with respect to misrepresentation of a past or existing fact entitled defendants to a directed verdict on plaintiff's fraud claim. At best the conversation about which plaintiff testified might establish a promise of future intent. *Braun, supra*.

There was nothing in plaintiff's testimony which would give rise to an inference that defendant intended for plaintiff to do anything in reliance upon the alleged conversation. Moreover, plaintiff further testified as follows:

Q. Okay. So what did you do as a result of that conversation?

A. I just kept making the mortgage payments and kept putting more, you know, money into the farm and *just going about my usual routine*.

(Emphasis supplied.) During cross-examination plaintiff testified as follows:

Q. Are you saying that we're dealing with a new agreement now?

A. *No*.

(Emphasis supplied.) Plaintiff's testimony, under extensive cross-examination, was to the effect that she felt vulnerable and was seeking something in writing so that if plaintiff "hit diamond" she would have something to establish the existence of the parties' alleged agreement. Plaintiff's evidence was not sufficient to establish that she reasonably relied upon the alleged conversation to deem that she was accruing stock whereby she was somehow acquiring an ownership interest in the farm. There was evidence that a witness named Pat Mazze assisted Robert Britt with the preparation of a financial statement that represented that Robert Britt held stock in Magnolia Hills, Inc. However, Robert Britt disavowed any knowledge of how this representation came to be included in his financial statement. Moreover, there was no con-

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**Rice v. Wood**

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nection established between this financial statement and the alleged telephone conversation between defendant Billy Britt and plaintiff. There was no evidence that plaintiff in any way changed her position in reliance upon the alleged telephone conversation. Nor was there any evidence that plaintiff suffered any injury from the alleged representation made by defendant Billy Britt. The trial court erred in denying defendants' motion for a directed verdict on plaintiff's fraud claim. In light of our decision we need not address defendants' remaining assignments of error. For reasons discussed above, the judgment is

Reversed.

Judges ARNOLD and WHICHARD concur.

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DONALD WILFORD RICE AND WIFE PATRICIA BAKER RICE v. PAUL GREGORY WOOD AND KIM IRVING HEATH D/B/A C & A ASSOCIATES

No. 8621DC143

(Filed 5 August 1986)

**1. Mortgages and Deeds of Trust § 1— deed and option to repurchase—allegedly intended as mortgage—defendants' motion for directed verdict properly denied**

There was substantial evidence sufficient to support plaintiff's prima facie case that a transaction in fact constituted a mortgage rather than a deed and option to repurchase and the trial court properly denied defendants' motion for directed verdict where foreclosure proceedings had been instituted on plaintiffs' house; plaintiffs' house was purchased by defendants from plaintiffs at less than fair market value; the sales price was arrived at by adding up plaintiffs' debts and the costs of the transaction; the transaction began out of negotiations for a loan rather than a sale; plaintiffs remained in possession, paying rent equivalent to their mortgage payments; defendants charged punitive late fees for past due rent; the price specified for reconveyance was the amount advanced by defendants plus a specified profit over the option period; and defendants eventually claimed that plaintiffs had breached the rental agreement and that the option to repurchase was void and sued plaintiffs in summary ejectment. N.C.G.S. § 1A-1, Rule 50(a).

**2. Mortgages and Deeds of Trust § 1— equitable mortgage—instructions—erroneous**

In an action in which plaintiffs alleged that a deed and option to repurchase constituted a mortgage, the trial court erred by refusing to submit to the jury the factors of whether a debt existed between the parties and the conduct of the parties before, at and after the transaction.

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**Rice v. Wood**

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APPEAL by defendants from *Hayes, Judge*. Judgment filed 17 September 1985 in District Court, FORSYTH County. Heard in the Court of Appeals 11 June 1986.

This case originally began in 1981 when defendants Wood and Heath, d/b/a C & A Associates brought a summary ejectment action against the plaintiffs, Donald and Patricia Rice. From an adverse ruling before a magistrate the Rices appealed to the District Court. They filed an answer and counterclaim and a third-party complaint against Harvey E. Fagerberg and Brantley Realty & Insurance Company. The third-party action was subsequently dismissed. Defendants Wood and Heath made a motion to dismiss the Rices' counterclaims, which was denied. Wood and Heath then took a voluntary dismissal of their summary ejectment action which left remaining only the counterclaims filed by the Rices. When the case came on for trial in September 1985 the trial court restyled the case designating Mr. and Mrs. Rice as plaintiffs and Wood and Heath d/b/a C & A Associates as defendants.

The plaintiffs' evidence established the following:

In 1969 Donald Rice and wife purchased a home at 3036 Airport Road, Winston-Salem. The purchase price was \$19,950.00 financed through Cameron-Brown Company. The monthly mortgage payments were originally \$139.00 but had gradually increased. In 1980, Cameron-Brown notified Mr. Rice that his mortgage payments would be increased to \$425.00 per month for 10 months in order to replenish his escrow account. Mr. Rice was unable to meet this increase and fell several months behind in his mortgage payments. As a result, Cameron-Brown instituted foreclosure proceedings.

Upon receiving notice of foreclosure, Mr. Rice, an employee of R. J. Reynolds, applied to his credit union for a loan. Shortly thereafter Mr. Rice received a letter from Harvey Fagerberg, a real estate agent with Brantley Realty and Insurance Company. In his letter Mr. Fagerberg explained that he had learned of the Rices' financial difficulties and impending foreclosure and offered his help. Mr. Rice met with Mr. Fagerberg and explained that he needed a loan to enable him to keep his house. Mr. Fagerberg indicated that he could help Mr. and Mrs. Rice and arranged to meet with both of them the next day. As a result of their meeting

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**Rice v. Wood**

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with Mr. Fagerberg, Mr. Rice cancelled his loan application with his credit union.

Mr. Fagerberg then arranged what the Rices testified they understood to be a second mortgage on their home. Both Mr. and Mrs. Rice testified that they requested a loan from Mr. Fagerberg, that they explained they wanted a second mortgage and wanted to keep their home. They testified that at no time did they ever intend to sell their home, but they admitted to signing all of the relevant documents. They did not read all of the documents that they signed though no one prevented them from reading the documents. They further testified that no one read or explained the documents to them and that at all times they believed they were signing documents to obtain a second mortgage on their home.

The first document the Rices signed was an exclusive listing agreement authorizing Brantley Realty to list the property for sale and to procure a purchaser at the price of \$21,250.00. Mr. Rice testified that at the time in 1980 the fair market value of the property was approximately \$46,000.00.

After the listing agreement was signed Mr. Fagerberg put the Rices together with defendants Wood and Heath d/b/a C & A Associates. The defendants agreed to invest in the Rices' home with a buy-back option and on 19 August 1980 the Rices signed a standard form "Offer to Purchase and Contract" which had been filled in by Mr. Fagerberg. The purchase price was \$21,000.00 to be paid as follows: \$500.00 earnest money, \$16,963.00 to assume the unpaid principal balance of the mortgage to Cameron-Brown and \$3,550.00 cash at closing. The purchase price was arrived at by adding up the Rices' debts and the cost of the transactions, i.e., mortgage assumption, foreclosure costs, attorney fees, brokerage fees and deed preparation. At closing, the Rices received \$743.08 cash. Attached to the offer to purchase was an additional document signed by the Rices giving them the option within 18 months to reassume their mortgage and repurchase their home for the sum of \$4,790.00 (\$4,037.00 buyer's cash outlay plus \$753.00 buyer's profit for the 18-month period). The option to repurchase expired on 28 February 1982.

Also included was a "Residential Rental Contract" which provided for an 18-month rental term, from 27 August 1980 through



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Rice v. Wood

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28 February 1982, during which time the Rices would retain possession of the home. Monthly rent payments required from the Rices were \$216.00—the same amount as the monthly mortgage payments due to Cameron-Brown. A handwritten provision in the rental contract provided that the Rices would be responsible for “all maintenance, repairs, and other items as noted in Standard Provision #2” of the residential rental contract. Standard provision number 2 was entitled “Landlord’s Obligations” and included such responsibilities as complying with all building and housing codes and making all necessary repairs due to ordinary wear and tear and all electrical, plumbing, sanitary, heating, ventilating and air conditioning systems. Another handwritten provision provided that “a late fee of \$20.00 per day will be charged for rental payments received after the first day of each month.”

The Rices fell behind in their rent payments and on 19 January 1981 the defendants brought the summary ejectment action seeking possession of the property, unpaid rent in the amount of \$432.00 and late fees totaling \$612.00. Judgment was entered against the Rices in the amount of \$432.00. The Rices then sought legal counsel. Through counsel the Rices appealed and stayed execution on the judgment by paying rent into the court. On 30 January 1981 the Rices’ attorney sent a letter to defendant Wood stating that the Rices intended to exercise their option to repurchase but requested that the buyer’s profit of \$753.00 be reduced and prorated over the six-month period that had elapsed from August 1980 through January 1981. This offer was eventually rejected by the defendants. On 19 February 1982 defendant Wood wrote a letter to Mr. and Mrs. Rice informing them that the option period would expire on 28 February 1982. It was not until March 1982 that Mrs. Rice informed her attorney of the letter. No other attempt to exercise the option to repurchase was made before the option period expired on 28 February 1982. However, plaintiffs’ evidence was that the defendants had previously informed them that they were not interested in allowing plaintiffs to repurchase because the plaintiffs had failed, in the past, to pay their rent on time. In March 1982 the Rices’ attorney contacted the defendants and offered the full amount to repurchase the property. The offer was rejected because the option period had expired.

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Rice v. Wood

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As to the sale of the property with a buy-back option the defendants' evidence was contradictory. Mr. Fagerberg testified that he informed the Rices that he could not make them a loan. He testified that he explained the various options available to the Rices and that Mr. Rice expressed interest in the conditional sale with a buy-back option. Mr. Fagerberg further testified that he explained the conditional sale to the Rices and that they had no objections or questions. He stated that Mr. Rice wanted to receive in cash somewhere between \$750.00 and \$1,000.00. Both Mr. Wood and Mr. Heath testified that they never intended to make any loan to the Rices. They entered into the arrangement as a business investment and created the partnership C & A Associates solely for the purpose of buying the Rice home as investment property. Mr. Wood testified that he reviewed and discussed the terms of the rental contract with both Mr. and Mrs. Rice. Mr. Heath testified that at closing all documents were explained and discussed and that the Rices were fully informed as to the transactions taking place.

The case was submitted to the jury on two alternative theories: (1) did the deed and option to repurchase taken together constitute a mortgage? or (2) did the defendants breach their contract to reconvey the property to the plaintiffs? The jury answered the first issue in favor of the plaintiffs and awarded to them the sum of \$26,132.00. Defendants appeal.

*Legal Aid Society of Northwest North Carolina, Inc. by Ellen W. Gerber and J. Griffin Morgan for plaintiff-appellees.*

*Laurel O. Boyles for defendant-appellants.*

EAGLES, Judge.

I

[1] Defendants first assign error to the trial court's denial of their motions for directed verdict made at the close of plaintiffs' evidence and all the evidence. By introducing evidence, defendants waived their motion made at the close of plaintiffs' evidence. *Overman v. Products Co.*, 30 N.C. App. 516, 227 S.E. 2d 159 (1976). We therefore consider only the trial court's denial of defendants' motion made at the close of all the evidence. Defendants contend that the evidence presented conclusively shows that the transac-

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Rice v. Wood

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tion was an absolute sale with a contract or option to repurchase. We disagree.

The purpose of a G.S. 1A-1, Rule 50(a) motion for directed verdict is to test the legal sufficiency of the evidence to take the case to the jury. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977). On a motion for directed verdict the court must consider the evidence in the light most favorable to the non-movant. This means that the evidence in favor of the non-movant must be taken as true, resolving all conflicts in the non-movant's favor and entitling him to the benefit of all reasonable inferences. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). The motion should be denied if there is "any evidence more than a scintilla" sufficient to support plaintiffs' prima facie case. *Cunningham v. Brown*, 62 N.C. App. 239, 240, 302 S.E. 2d 822, 824, *disc. rev. denied*, 308 N.C. 675, 304 S.E. 2d 754 (1983) (quoting *Wallace v. Evans*, 60 N.C. App. 145, 146, 298 S.E. 2d 193, 194 (1982)).

The law of this State is well settled that where land is conveyed by a deed absolute and at the same time an agreement is executed that the grantee will reconvey the property if the grantor pays a sum certain at or before a specified time, the two documents, taken together, may either be a sale with a contract to repurchase or a mortgage. *O'Briant v. Lee*, 214 N.C. 723, 200 S.E. 865 (1939). Whether a particular transaction constitutes a mortgage or a sale with a contract to repurchase depends on the particular facts and circumstances involved, but in all cases, the decision finally turns on the real intention of the parties as disclosed by the writings or extrinsic evidence. *Id.* "A general criterion, however, has been established by an overwhelming consensus [sic] of authorities, which furnishes a sufficient test in the great majority of cases; . . . This criterion is the continued existence of a debt or liability between the parties, so that the conveyance is in reality intended as a security for the debt." *Id.* at 725-26, 200 S.E. at 867. The debt may exist prior to the conveyance or may arise from a loan made at the time of the conveyance. *Id.* In any event, the debt must not be discharged or satisfied by the conveyance; the grantor should remain bound to pay at some future time. *Id.* It is not merely the existence of the deed and an agreement to reconvey that constitutes the mortgage. "On the contrary, it is absolutely essential that at the incep-

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Rice v. Wood

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tion of the transaction the deed be intended to operate by way of security." *Id.* at 727, 200 S.E. at 867.

The documents themselves may show, on their face, that they were intended as security. However, if it does not affirmatively appear from the documents that they were intended as security and that fact cannot be reasonably inferred, then our Supreme Court has held that the actual intent of the parties is the controlling criterion in determining the true nature and effect of the documents. *Id.* at 732, 200 S.E. at 871. In establishing this intent, the plaintiff, grantor in the deed, has the right to prove by evidence *dehors* the deed that the transaction was really a mortgage. *Id.* However, the mere declaration of the plaintiff grantor will not be enough to show that the parties intended a mortgage. *Hodges v. Hodges*, 37 N.C. App. 459, 246 S.E. 2d 812 (1978).

If there was a debt, either antecedent or presently created, the instrument must be construed to constitute a mortgage, unless a contrary intent clearly appears upon the face of the instruments. If this fact does not appear, then the continued possession of the property by the grantor; the inadequacy of the consideration; that the negotiations originated out of an application for a loan; the circumstances surrounding the transaction; and the conduct of the parties before, at, and after the time of the execution of the instruments are some of the circumstances to be considered.

*O'Briant v. Lee*, *supra* at 733, 200 S.E. at 871.

In the instant case the deed and option to repurchase do not affirmatively show that the parties intended a mortgage. Further, such intent cannot reasonably be inferred from the documents. *O'Briant v. Lee*, *supra*. Therefore, it was necessary that plaintiffs prove the intent to create a mortgage by proving facts and circumstances *dehors* the deed inconsistent with an absolute conveyance. *Id.* See also *Ricks v. Batchelor*, 225 N.C. 8, 33 S.E. 2d 68 (1945). When, in response to *O'Briant v. Lee*, *supra*, we look at the circumstances to be considered in determining actual intent, we find here ample facts and circumstances sufficiently proved to support plaintiffs' claims. First, plaintiffs remained in possession of the property following the conveyance, paying rent to the defendants in the sum of \$216.00 per month, an amount equal to the monthly mortgage payments due to Cameron-Brown. Second, as

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**Rice v. Wood**

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to the consideration paid, plaintiffs' evidence showed that at the time of conveyance the fair market value of their property was between \$42,500 and \$46,000. The sales price was \$21,000 which included an assumption of the mortgage to Cameron-Brown of approximately \$17,000. Further, plaintiffs received only \$743.00 cash from the sale. The sales price was not arrived at by determining fair market value but by adding up the costs of the transaction, i.e. mortgage assumption, foreclosure costs, attorney fees, deed preparation and realtor's commission plus an additional \$743.00 to the plaintiffs to cover outstanding debts. The price specified for reconveyance was the amount advanced by the defendants plus a profit of \$753.00 over the 18-month option period. Third, the transaction began out of negotiations for a loan not a sale. Mr. Rice testified that he requested a loan with a second mortgage and that he at all times wanted to keep his home and not sell it. Mr. Fagerberg testified that Mr. Rice came to him for a loan but that he could not make him a loan and as a result arranged the sale to C & A Associates with an option to repurchase instead. Fourth, the circumstances surrounding the transaction and fifth, the conduct of the parties before, at and after the conveyance reveal that the plaintiffs were in financial distress when they sought the help of Mr. Fagerberg. Foreclosure proceedings had been instituted by Cameron-Brown. Mr. Rice cancelled his pending application for a loan with his credit union as a result of his meeting with Mr. Fagerberg. The house was purchased at less than fair market value. Plaintiffs remained in possession as tenants paying rent equivalent to the mortgage payments. Defendants charged punitive late fees for past due rent in the amount of \$20.00 per day. Defendants eventually claimed that plaintiffs had breached the rental agreement and that the option to repurchase was void. Defendants sued plaintiffs in summary ejectment seeking \$432.00 in back rent, \$612.00 late fees and to have the plaintiffs removed from the premises. Finally, we note that when evidence leaves the status of the transaction in doubt, courts generally hold a deed with an accompanying provision for reconveyance to be a mortgage rather than a conditional sale. *O'Briant v. Lee, supra.*

Looking at the five factors stated by the court in *O'Briant v. Lee, supra*, we find that there was substantial evidence, clearly more than a scintilla, sufficient to support plaintiffs' prima facie

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Rice v. Wood

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case that the transaction in fact constituted a mortgage and that the trial court properly denied defendants' motion for directed verdict made at the close of all the evidence.

Defendants' primary argument is that the transaction could not be a mortgage because there was no debt created by the transaction since the contract to repurchase was entirely optional with the plaintiffs as to whether they would repurchase their home. This same argument was rejected by the Supreme Court in *O'Briant v. Lee, supra*.

But the contention is here made that there is no reciprocal obligation resting on the grantors to redeem; that it is entirely optional with them as to whether they shall exercise the right to repurchase within the time stipulated; that it does not appear upon the face of the papers that there is any personal obligation on the part of the grantors to pay the amount of the alleged loan and interest. This is not essential. Evidence of the indebtedness is not required to be in writing. It may be proven by parol. Furthermore, such obligation would only enable the mortgagee to look to the mortgagor for any deficiency remaining after the application of the proceeds of sale of the premises to the payment of the sum secured. In the cases where the question has arisen whether the transaction was one of purchase or of security and the instruments disclosed a debt in the amount of the alleged purchase price and no other sum is paid it has been held that this fact determines conclusively the character to the transaction as a mortgage. [Citations omitted.]

There may be no independent evidence of the debt—no bond, bill, or note taken for its payment: It may rest wholly on implication from the nature, facts, and circumstances of the transaction; it is sufficient that its evidence is the fair, just implication. . . . Indeed, when the purpose of the creditor is to avoid the appearance of a mortgage (as here alleged), it is not to be expected that he would defeat it by the introduction of an express covenant for the payment of the money or any other independent security disclosing its existence. [Citation omitted.]

*O'Briant v. Lee, supra* at 733, 200 S.E. at 871-72. Accordingly, this assignment is overruled.

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Rice v. Wood

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## II

[2] Defendants next assign error to the jury instructions. Defendants contend, by two separate assignments of error, that the trial court erred in explaining the law as to equitable mortgages and by failing to use defendants' proposed instructions. We agree that the trial court's instructions were fatally defective.

Specifically, defendants argue that the trial court erred in omitting certain factors for the jury to consider in deciding if the transaction constituted a mortgage or conditional sale. Defendants insist that it was prejudicial error for the trial court to exclude the following three factors: (1) did a debt exist between the parties; (2) were the plaintiffs bound to repurchase the property; and (3) the conduct of the parties before, at and after the transaction. We address each factor individually.

We believe the trial court committed prejudicial error by refusing to submit to the jury the factor of whether or not a debt existed between the parties. There can be no mortgage unless and in fact a debt exists between the parties for by definition a mortgage is "an interest in land created by a written instrument providing security for the performance of a duty or the payment of a debt." Black's Law Dictionary 911 (5th ed. 1979). An instrument, irrespective of its form, is a mortgage if intended as security for the payment of a debt and "once a mortgage, always a mortgage." *O'Briant v. Lee*, *supra* at 725, 200 S.E. at 867.

As we stated earlier, *O'Briant v. Lee* makes it clear that it is absolutely essential that at the inception of the transaction the deed be intended to operate by way of security. This requires the continued existence of a debt or liability between the parties so that the absolute conveyance is in reality intended as security for the debt. *Id.* As explained by our Supreme Court in *Ferguson v. Blanchard*, 220 N.C. 1, 7-8, 16 S.E. 2d 414, 418 (1941):

Whether any particular transaction amounts to a mortgage or an option of repurchase depends upon the real intention of the parties, as shown on the face of the writings, or by extrinsic evidence, and the distinction seems to be whether the debt existing prior to the conveyance is still left subsisting or has been entirely discharged or satisfied by the conveyance. If no relation whatsoever of debtor and creditor

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Rice v. Wood

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is left subsisting, the transaction is a sale with contract of repurchase, since there is no debt to be secured. Pomeroy's Equity Jurisprudence, sec. 1195.

The debt may have existed prior to the conveyance or it may have been created at the time of the transaction. *O'Briant v. Lee, supra*. In either event, a material question to be answered is whether the relationship of debtor and creditor continues to exist after the conveyance? *Hardy v. Neville*, 261 N.C. 454, 135 S.E. 2d 48 (1964). "If the relation of debtor and creditor still continues, equity will regard the transaction as a method of securing a debt—and hence a mortgage." *Ricks v. Batchelor, supra* at 11, 33 S.E. 2d at 70.

While the trial court did instruct the jury that the parties must have intended a mortgage, only three factors were given to the jury for their consideration: (1) the financial situation of the parties, (2) the inadequacy of the consideration, and (3) the fact that plaintiffs remained in possession of the property following the conveyance. The trial court never mentioned the crucial requirement of the creation and continued existence of a debt. We believe this omission constitutes prejudicial error.

We do believe that the trial court properly refused to submit to the jury defendant's second proposed instruction as to whether the plaintiffs were bound to repurchase the property. The document executed by the parties that accompanied the deed clearly gave plaintiffs the *option* to repurchase the property from defendants for \$4,790.00 on or before 28 February 1982. An option is a unilateral contract by which the maker grants to the optionee the right to accept or reject a present offer within a limited time. *Lentz v. Lentz*, 5 N.C. App. 309, 168 S.E. 2d 437 (1969). It imposes no obligation to purchase upon the obligee. *Sandlin v. Weaver*, 240 N.C. 703, 83 S.E. 2d 806 (1954). As explained by our Supreme Court in *O'Briant v. Lee, supra*, it is not essential that the documents show that the grantors were personally obligated to pay that amount of the loan and interest. That obligation only enables the mortgagee to look to the mortgagor for any deficiency remaining after application of the sale proceeds to the sum secured. *Id.*

The trial court should also have included defendants' third proposed factor—conduct of the parties before, at and after the



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Seifert v. Seifert

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transaction—in his instructions to the jury. This is a proper factor to be considered as explained by the court in *O'Briant v. Lee*. We are mindful of the trial court's instruction that the jury consider the facts and circumstances surrounding the transaction. However, as *O'Briant v. Lee* makes clear, the conduct of the parties is a separate factor for consideration in determining the parties' actual intent.

A jury charge is sufficient if, when it is read contextually, it clearly appears that the law was presented in such a manner that there is no reasonable cause to believe that the jury was misled or misinformed. *Gathings v. Sehorn*, 255 N.C. 503, 121 S.E. 2d 873 (1961). The burden is on the appellant to show not only error but to show that if the error had not occurred there is reasonable probability that the result of the trial would have been favorable to him. *Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967). The jury charge as given omitted a critical factor for the jury's consideration in determining the parties' intent. We cannot say that by the instruction given that there is no reasonable cause to believe that the jury was misled. The facts before us present a close factual question and we believe appellants have carried their burden.

We do not pass on appellants' remaining assignments of error which raise the same questions as their first assignment of error. This case will be remanded to the district court for a new trial.

New trial.

Judges ARNOLD and PARKER concur.

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MARGIE S. SEIFERT v. PAUL J. SEIFERT

No. 8612DC2

(Filed 5 August 1986)

**1. Divorce and Alimony § 30— equitable distribution—pension rights—method of evaluation and distribution**

When evaluating and distributing pension and retirement benefits for equitable distribution, the trial court may properly consider the advantages and disadvantages of the present discounted value method and the award of a

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**Seifert v. Seifert**

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fixed percentage of future payments; whether one or the other method is appropriate is in the discretion of the trial court and should be based on the facts and circumstances of each case. N.C.G.S. § 50-20(k), N.C.G.S. § 50-20(b)(3).

**2. Divorce and Alimony § 30— equitable distribution—pension benefits—erroneously determined**

The trial court erred in an equitable distribution action in its order of evaluation and distribution of defendant's vested military pension and benefit rights by impermissibly utilizing a present value and ordering a deferred payment.

**3. Divorce and Alimony § 30— equitable distribution—pension rights—evidence of pay rate at date of trial excluded—no error**

The trial court did not err in an equitable distribution action by refusing to allow into evidence the amount of defendant's base pay at the date of trial. N.C.G.S. § 50-21(b) requires that marital property be valued as of the date of separation when the parties are divorced on the ground of one year separation.

Chief Judge HEDRICK dissenting.

APPEAL by plaintiff from *Keever, Judge*. Judgment entered 13 September 1985 in District Court, CUMBERLAND County. Heard in the Court of Appeals 14 May 1986.

Plaintiff Margie Seifert and defendant Paul Seifert were married on 30 June 1961, separated on 11 September 1983 and divorced in March of 1985. On 3 September 1985 a hearing was had on plaintiff's request for an equitable distribution of the marital property. Both parties presented evidence as to the existence and value of the marital property. Most of the evidence presented dealt with the existence and value of the parties' individual pension and retirement benefits. From 1973 through the date of separation plaintiff was employed as a car salesperson with Stewart Oldsmobile in Fayetteville. From September 1958 through the date of separation defendant served in the United States Army. As of the date of separation, both parties' pensions and retirement rights were vested and pursuant to G.S. 50-20(b)(1) the trial court properly included them as marital property.

The parties stipulated that plaintiff's pension and retirement benefits connected with her employment at Stewart Oldsmobile had a total value at the time of separation of \$43,284.07. That amount included \$12,787.89 of voluntary contributions by the plaintiff. The value of her pension and retirements benefits is not disputed.

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Seifert v. Seifert

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The trial court valued defendant's pension and retirement benefits based on defendant's basic pay at the date of separation of \$1,780.00 per month. The trial court determined that had the defendant retired when he and the plaintiff separated, he would have been entitled to receive 62½% of his basic pay or a total of \$1,112.50 per month. Pursuant to G.S. 50-20(b)(3) the trial court determined that as of the date of separation defendant had served 24 years and 11 months in the United States Army of which 22 years and 3 months were served while defendant was married to plaintiff. From these figures the trial court determined that 87½% of defendant's pension and retirement benefits were earned during the marriage. Using a life expectancy for defendant of 25.5 years and a rate of investment return of 10%, the trial court computed the present lump sum value of defendant's pension and retirement benefits, as of the date of separation, to be \$108,491.60 and included the full amount as marital property.

The trial court concluded as a matter of law that an equal division of the marital property would be equitable. The value of the marital property totaled \$194,250.67. The trial court awarded to plaintiff the full amount of her vested pension, \$43,284.07, an amount undisputed by the parties. In reaching an equal division of the marital property, the trial court also awarded to the plaintiff the sum of \$20,966.26 as plaintiff's portion of the present value of defendant's vested military pension. The trial court ordered that the sum of \$20,966.26 would be distributed to the plaintiff in monthly installments of \$188.07 from defendant's disposable retired pay at the time the defendant actually begins to receive his retirement pay. From the trial court's judgment establishing valuation and providing for disbursement of defendant's pension and retirement benefits, plaintiff excepts and appeals.

*McLeod, Senter & Winesette by William L. Senter for plaintiff-appellant.*

*Blackwell, Swaringen & Russ by John Blackwell, Jr. and Margaret R. Russ for defendant-appellee.*

EAGLES, Judge.

By her two assignments of error, plaintiff contends that the trial court erred in valuing and distributing defendant's military pension and retirement benefits. Plaintiff's primary argument is

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**Seifert v. Seifert**

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that the trial court erred in valuing defendant's pension as of the date of separation. Specifically, plaintiff argues that the trial court erred in using defendant's base pay *at the time of separation* in calculating the amount of retirement income to be designated as marital property and in refusing to allow into evidence defendant's base pay at the date of trial.

The division of marital property under G.S. 50-20 is a matter within the sound discretion of the trial court and "where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion. [Citations omitted.] A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E. 2d 829, 833 (1985). We have carefully reviewed the evidence of record and reluctantly conclude that the trial court erred and abused its discretion in its order of valuation and distribution of defendant's vested military pension and retirement benefits.

Our equitable distribution statutes, G.S. 50-20 and -21, provide for the equitable distribution of the marital property following a decree of absolute divorce. G.S. 50-20(a)(1) defines marital property as including "all vested pensions and retirement rights, including military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act." The rights of the parties to an equitable distribution of the marital property vest at the time the action for divorce is filed, G.S. 50-20(k); however, if the divorce is granted on the ground of one year separation, the marital property must be valued as of the date of separation. G.S. 50-21(b). The plaintiff and defendant here were divorced on the ground of one year separation. G.S. 50-6. Therefore, defendant's vested military pension and retirement benefits must be valued as of the date of separation.

Most pension and retirement plans can be described as falling within two categories: defined contribution plans and defined benefit plans. B. Goldberg, *Valuation of Divorce Assets* Section 9.2 (1984). A defined contribution pension is essentially an annuity funded by periodic contributions. At retirement the funds purchase an annuity for the rest of the employee's life or an actuarially reduced pension for the lives of the employee and spouse. 2 *Valuation and Distribution of Marital Property* Section 23.02[1][b] (J.

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Seifert v. Seifert

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McCahey ed. 1985). A defined contribution pension may be nominally funded by the employee, the employer or both. Realistically, the employee funds his own pension whether he or his employer is the nominal payor because the burden of the employer's contribution is passed directly to the employee in the form of reduced wages. *Id.* at Section 23.02[1][a]. Accordingly, pensions are characterized as "deferred compensation," for without the pension it is assumed that the employee would have received a commensurately greater salary during his working years. *Id.*

In a defined benefit plan the employee's pension is determined without reference to contributions and is based on factors such as years of service and compensation received. Goldberg, *supra*. Some plans combine both defined contribution and benefit elements. For example, federal and many state civil service pensions are often nominally funded by both employer and employee. If the employee terminates employment before retirement, he receives a refund of his contribution. If he remains until retirement, he receives benefits based on his pre-retirement salary. 2 Valuation and Distribution of Marital Property Section 23.02[1][b] (J. McCahey ed. 1985).

Defendant's military pension and benefits fall within the category of defined benefit plans. The military retirement system is noncontributory, funded by annual appropriations from Congress and administered by the Department of Defense. *McCarty v. McCarty*, 453 U.S. 210, 69 L.Ed. 2d 589, 101 S.Ct. 2728 (1981). Vesting does not occur until a member has served a minimum prescribed period, currently twenty years for a commissioned officer, 10 U.S.C. Section 3911 and 30 years for an enlisted member, 10 U.S.C. Section 3917. Military retirement pay commences at the time of retirement with the amount calculated on the basis of years served and rank achieved by a statutorily provided formula: (basic pay, based on the retired grade and years of service of the member) x (2½%) x (the number of years of creditable service). 10 U.S.C. Section 3991. *See McCarty, supra*. At twenty years service the eligible retiree is entitled to at least 50% of his basic pay. (Excluding special pay and allowances.) However, 75% of basic pay is the maximum amount permitted—the percentage attained upon completion of 30 years service (30 years x 2½%)—regardless of the number of years served. 10 U.S.C. Section 3991. *See McCarty, supra* n. 7. If a member terminates his service

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**Seifert v. Seifert**

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before twenty years the entitlement to retirement pay is forfeited. Military retirement pay terminates at the retiree's death and does not pass to his heirs. However, a retiree may designate a beneficiary to receive any arrearages due but unpaid at his death. *McCarty*, *supra*. 10 U.S.C. Section 2771.

In applying our equitable distribution statutes the trial court must follow a three-step procedure, (1) classification, (2) evaluation and (3) distribution. *Cable v. Cable*, 76 N.C. App. 134, 331 S.E. 2d 765, *disc. rev. denied*, 315 N.C. 182, 337 S.E. 2d 856 (1985). For many divorcing couples pension and retirement benefits comprise a major portion of the marital property. 2 Valuation and Distribution of Marital Property at Section 23.02[1]. We recognize that trial courts are faced with a complex task in valuing and distributing pension and retirement benefits between former spouses. G.S. 50-20(b)(3) provides some guidance with respect to distributive awards of these assets, but the division of marital property is a function left largely to the sound discretion of the trial court. *White*, *supra*. Given the breadth of the trial court's discretion in this area, we can do no more than point out fundamental errors and make some general observations as to the appropriate methods of valuation and distribution.

[1] There are two primary methods utilized by courts of other jurisdictions in evaluating and distributing pension and retirement benefits. The first method is the present discounted value method. There the trial court calculates, using actuarial evidence, the present value of the vested pension, as of the date of separation (if the parties were divorced on the ground of one year separation (G.S. 50-21(b))), discounted for interest in the future and taking into account the employee spouse's life expectancy. The trial court would further have to compute the percentage of present value attributable to the marriage period (the time between date of marriage and date of separation) and the appropriate equitable share to which the nonemployee spouse is entitled. *In re Marriage of Hunt*, 78 Ill. App. 3d 653, 397 N.E. 2d 511 (1979); *Bloomer v. Bloomer*, 84 Wis. 2d 124, 267 N.W. 2d 235 (1978); *see also Johnson v. Johnson*, 131 Ariz. 38, 638 P. 2d 705 (1981); *In re Marriage of Skaden*, 19 Cal. 3d 679, 139 Cal. Rptr. 615, 566 P. 2d 249 (1977); *In re Marriage of Wisniewski*, 107 Ill. App. 3d 711, 437 N.E. 2d 1300 (1982); *Deering v. Deering*, 292 Md. 115, 437 A. 2d 883 (1981); *Dewan v. Dewan*, 17 Mass. App. 97, 455 N.E. 2d 1236

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Seifert v. Seifert

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(1983); *Kis v. Kis*, --- Mont. ---, 639 P. 2d 1151 (1982); *Kullbom v. Kullbom*, 209 Neb. 145, 306 N.W. 2d 844 (1981); and *Damiano v. Damiano*, 94 A.D. 2d 132, 463 N.Y.S. 2d 477 (2d Dept. 1983). This type of valuation can be somewhat speculative because, depending on the facts and circumstances, it may necessarily involve consideration of various uncertainties. *In re Marriage of Brown*, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P. 2d 561, 94 A.L.R. 3d 164 (1976); accord *Dewan*, *supra* and *Deering*, *supra*; see also *Holbrook v. Holbrook*, 103 Wis. 2d 327, 309 N.W. 2d 343 (1981).

In *Dewan*, *supra*, the usefulness of the present discounted value method is discussed, though it is referred to as "present assignment as property":

Where the spouses are far from retirement age and the marriage is of short duration, present assignment as property may be feasible by reason of the fact that the prospective pension has little present value due to long deferred receipt and because the nonretiring spouse's appropriate share of pension benefits when paid would be confined by the brevity of the marriage. Where the marriage has been of long duration and retirement age is more proximate, the greater value of the prospective pension benefits may make present assignment as an asset unfeasible, at least in the absence of other significant assets, or the valuation of pension rights may be unduly speculative, especially where they are subject to destruction by premature death or termination of employment.

*Dewan*, *supra*, 455 N.E. 2d at 1240. See also *Robert C.S. v. Barbara J.S.*, 434 A. 2d 383 (Del. S.Ct. 1981); but see *Wisniewski*, *supra*. When the present discounted value method is used, the trial court orders *immediate* distribution of the nonemployee spouse's share. This is accomplished by an immediate lump sum payment, by payments prior to retirement in installments with interest or by the redistribution of other marital property. *Bloomer*, *supra*; *Damiano*, *supra*; and *Wisniewski*, *supra*.

There are several advantages to present discounted valuation with immediate distribution. For example, with present valuation the nonemployee spouse receives present, existing assets when they are most needed, and avoids the risk of adverse financial consequences if the employee spouse quits, is fired, dies or becomes disabled. Present valuation terminates litigation sooner

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**Seifert v. Seifert**

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and avoids the continuation of potentially acrimonious relationships, gives the nonemployee spouse use of cash or other marital assets in exchange for the *in futuro* retirement benefits and gives the nonemployee spouse assets otherwise subject to testamentary disposition. Present valuation precludes the nonemployee spouse from unfairly sharing in post-separation promotions or increases in pay which are separate property and which may generate high-pensions. *Goldberg, supra* at Section 9.5.

The major disadvantage of the present value method is that the employee spouse bears the risk of paying the nonemployee spouse for rights that may never mature. *Johnson, supra*. Additionally, the employee spouse may feel cheated because he or she receives only an expectancy of benefits while the nonemployee spouse gets present "real" assets such as home equity, stocks or cash payment. *Id.*

The second method of valuation and distribution widely used by other jurisdictions allows the court to award to the nonemployee spouse a fixed percentage of any future payments the employee spouse receives under the plan, payable to the nonemployee spouse as, if and when the benefits are received. *Dewan, supra*; *Majauskas v. Majauskas*, 110 Misc. 2d 323, 441 N.Y.S. 2d 900 (1981), *modified*, 94 A.D. 2d 494, 464 N.Y.S. 2d 913 (1983); *Bloomer, supra*. See also, *Skaden, supra*; *Jerry L.C. v. Lucille H.C.*, 448 A. 2d 223 (Del. S.Ct. 1982); *Hunt, supra*; and *King v. King*, 332 Pa. 526, 481 A. 2d 913 (1984). Under this method, the trial court need not determine present value of the pension. All the court must do is to determine the percentage to which the nonemployee spouse is entitled. *Brown, supra*. See also *Bloomer, supra*, *Deering, supra*, and *Kullbom, supra*. When utilizing this evaluation and distribution method, the court should award to the nonemployee spouse a percentage of that portion of the pension benefits attributable to the marriage period. The portion attributable to the marriage is determined by multiplying the net pension benefits by a fraction, the numerator of the fraction being the total period of time the employee spouse was a participant in the plan within the marriage period (from date of marriage to date of separation) and the denominator being the total period of the employee spouse's participation in the plan. *King, supra* and *Dewan, supra*. See also *Hunt, supra*; *Majauskas, supra*.



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**Seifert v. Seifert**

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We believe that this second method is consistent with G.S. 50-20(b)(3) which provides that the distributive award of vested pension and retirement benefits may be payable "[a]s a prorated portion of the benefits made to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits." The statute requires that the award not be based on contributions made *after* separation. This requirement is fulfilled by determining the nonemployee spouse's fixed percentage as of the date of separation. The statute also states that the award *shall* include any growth on the amount of the pension or retirement account vested at the time of separation. We believe that this method also provides for any "growth" on the amount of the vested pension or retirement benefits because the nonemployee spouse will receive a fixed percentage of the benefits actually received by the employee spouse at retirement. We note further, however, that G.S. 50-20(b)(3) specifically limits a nonemployee spouse's award to 50% of the cash benefits received by the employee spouse.

There are also some advantages to utilizing the deferred division of benefits on a fixed percentage basis as, if and when the benefits are received. This method of evaluation and distribution avoids any risk of paying the nonemployee spouse for rights which, due to intervening events, may not in fact mature. *Goldberg, supra* at Section 9.5.

Reserving jurisdiction over the future benefits in affecting [sic] a subsequent division of the actual monetary benefits [has] the dual advantage of allocating equally between the parties the risk that the rights may never vest [or mature] and enabling the court to better determine the actual proportion of future benefits that accrued to each party during the marriage.

*Goldberg, supra* at Section 9.5 n. 3. Using this method the nonemployee spouse is permitted to share in the increases in retirement benefits due to post-separation efforts which were built on the foundation of marital effort. Further, this method avoids prolonging the hearing with complicated actuarial evidence and costly expert testimony. *Goldberg, supra*. One writer suggests that the use of deferred distribution is preferred in circumstances where it is difficult to presently value the pension or retirement rights due

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**Seifert v. Seifert**

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to uncertainties in vesting or maturation or where the present value is ascertainable but the type, or lack of, marital property involved makes it impractical to order immediate distribution. *Goldberg, supra* at Section 9.5 n. 3. In deciding which method of evaluation and distribution of retirement benefits should be adopted, the trial court may properly consider the advantages and disadvantages of each.

Equitable distribution reflects the idea that marriage is a partnership enterprise to which both spouses make vital contributions and reflects the strong public policy favoring the equal division of marital property unless equal division is not equitable. *White, supra*. Fairness and equity should guide the trial court in deciding how to evaluate and distribute marital property. Whether one or the other of these methods is appropriate is left to the discretion of our trial courts and should be decided based on the facts and circumstances of each case.

[2] Here the trial court made a determination of the present value of the pension (\$108,491.60) as of the date of separation and awarded a portion of that value (\$20,966.26) to the plaintiff. In distributing the presently valued award the trial court ordered that the actual payment of this amount would be deferred until the pension entered pay status, payable in monthly amounts of \$188.07. We have concluded that the method used to divide the pension was faulty in that the trial court impermissibly utilized a present value in ordering a deferred payment. See *King v. King, supra*. This, in effect, operated as a double reduction: plaintiff received a *discounted* value for immediate distribution but nevertheless was required to wait to receive payment until, if and when, the defendant reached retirement and began receiving benefits.

[3] Plaintiff contends that the trial court erred when it refused to allow into evidence the amount of defendant's basic pay at the date of trial. Plaintiff asserts that the trial court should have presently valued defendant's military pension using defendant's basic pay at the date of trial and not defendant's basic pay at the date of separation. Plaintiff's offer of proof shows that the amount of defendant's basic pay at trial was substantially higher than his basic pay at separation. G.S. 50-21(b) *requires* that marital property be valued as of the date of separation when, as here, the par-

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Seifert v. Seifert

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ties are divorced on the ground of one year separation. The trial court correctly used the present value of defendant's military pension, as of the date of separation.

In summary the trial court erred and abused its discretion when, after properly choosing in its discretion to use the present value evaluation method, it impermissibly postponed or deferred payment instead of ordering immediate payment.

Accordingly the order is vacated and the case is remanded for further proceedings in light of this opinion and any further evidence that may be received.

Vacated and remanded.

Judge COZORT concurs.

Chief Judge HEDRICK dissents.

Chief Judge HEDRICK dissenting.

I disagree with the majority's conclusion that the trial court "erred and abused its discretion" in failing to order immediate payment of vested pension benefits. G.S. 50-20(b)(3) provides that vested pension rights may be distributed in one of three ways: "a. As a lump sum *by agreement*; b. Over a period of time in fixed amounts *by agreement*; or c. As a prorated portion of the benefits made to the designated recipient *at the time the party against whom the award is made actually begins to receive the benefits.*" (Emphasis added.) The record before us contains no evidence that the parties have reached agreement about distribution under (a) or (b) above. Consequently, the trial judge had no authority to order immediate payment of benefits. Indeed, any such action by the trial court would have been in direct violation of G.S. 50-20(b)(3).

While I recognize that the balance of the majority opinion is dicta, I feel it necessary to point out that the second valuation method discussed and approved by the majority is inconsistent with both statutory and case law in this state. Our law provides that the trial court must identify marital property, ascertain its net value, and then equitably distribute the property. *Cable v. Cable*, 76 N.C. App. 134, 331 S.E. 2d 765, *disc. rev. denied*, 315

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**In re Manus**

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N.C. 182, 337 S.E. 2d 856 (1985). The court must value the marital property *as of date of separation*, G.S. 50-21(b), and failure to do so is reversible error. *Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E. 2d 772 (1984). Valuation is a prerequisite to distribution. *Turner v. Turner*, 64 N.C. App. 342, 307 S.E. 2d 407 (1983). In short, our law requires the trial court to value marital property as of date of separation even when valuation is difficult and the results necessarily speculative. The advantages of distributing without valuing this particular type of marital property are set out in considerable detail in the majority opinion. Despite these advantages, however, this is a course our law does not allow.

I vote to affirm the ruling of the trial court.

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IN RE: MANUS, UNION COUNTY DEPARTMENT OF SOCIAL SERVICES, BY  
AND THROUGH ITS DIRECTOR, H. GENE HERRELL v. TERESA GEORGETTE  
MULLIS AND DAVID NEAL MANUS

No. 8620DC54

(Filed 5 August 1986)

**1. Parent and Child § 1.5— termination of parental rights—caption of petition—valid**

A petition to terminate parental rights was valid even though it was brought individually by the director of DSS because it was readily apparent that he was petitioning not as an individual but on behalf of DSS; moreover, under N.C.G.S. § 1A-1, Rule 17(a), dismissal of the petition would not be warranted because the record does not reflect that respondents raised any question at trial with respect to the director's capacity to petition and the petition provided respondents with full notice of the transactions and occurrences upon which the petition was based. N.C.G.S. 7A-289.24(3), N.C.G.S. 7A-289.25(2).

**2. Parent and Child § 2.3— termination of parental rights—findings based solely on past conditions—insufficient**

The trial court's conclusion in a proceeding to terminate parental rights that respondents' children were neglected within the meaning of N.C.G.S. 7A-289.32 and N.C.G.S. 7A-517(21) was not supported by the findings where those findings were based upon evidence of neglect which occurred before the only respondent to appeal lost custody of her daughter or were based upon events which occurred more than a year before the termination hearing.

**3. Parent and Child § 2.3— termination of parental rights—failure to pay portion of costs of care—no finding of ability to pay**

An order terminating parental rights in part upon the ground that respondent had failed to pay a reasonable portion of the costs of her children's

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In re Manus

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care while they were in DSS custody was vacated where there were no findings with respect to respondent's ability to pay. N.C.G.S. § 7A-289.32(4).

ON certiorari to review the Order of *Honeycutt, Judge*. Order entered 4 February 1985 in District Court, UNION County. Heard in the Court of Appeals 9 May 1986.

On 17 October 1984, a petition was filed by "H. Gene Herrell, Director of the Union County Department of Social Services" seeking the termination of the parental rights of respondent appellant, Teresa Georgette Mullis, and respondent, David Neal Manus, as to their children, Crystal Lynn Manus, born 22 July 1981, and Carolyn Irene Manus, born 13 June 1982. Crystal was initially placed in the custody of the Department of Social Services (DSS) by order dated 21 January 1983 and Carolyn was placed in DSS custody by order dated 25 August 1983.

After a hearing on 30 December 1984, an order was entered 4 February 1985 terminating the parental rights of respondents as to both children. Respondent Teresa Mullis gave notice of appeal but her appeal was dismissed by this Court on 4 December 1985 due to her failure to file a brief. She then petitioned this Court for a writ of certiorari to review the Order terminating her parental rights. Certiorari was granted on 19 December 1985. Respondent David Neal Manus did not appeal nor did he apply for certiorari.

*W. David McSheehan for respondent appellant.*

*Griffin, Caldwell, Helder & Steelman, by Jake C. Helder, and Harry B. Crow, for petitioner appellee.*

MARTIN, Judge.

Respondent Mullis contends that the trial court committed both procedural and substantive errors. She contends that the petition for termination of parental rights was invalid because it was not initiated by a person or agency authorized to maintain such actions and that the trial court erred in permitting an amendment to the petition without notice to her. She also contends that the court's findings of fact are not supported by competent evidence and are insufficient to support its conclusions of law and its order terminating her parental rights. Her latter con-

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In re Manus

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tentions have some merit and we find it necessary to vacate the order and remand the case.

[1] We first consider respondent's procedural arguments. The petition as originally filed was captioned

In re: Manus, minor children

H. Gene Herrell, DIRECTOR OF THE  
UNION COUNTY DEPARTMENT OF  
SOCIAL SERVICES,  
Petitioner,

vs.

TERESA GEORGETTE MULLIS and  
DAVID NEAL MANUS,  
Respondents.

By written motion dated 17 December 1984 and marked filed by the Clerk of Superior Court on 24 January 1985, petitioner moved to amend the *caption* "in order to conform the caption of the petition and action to G.S. 7A-289.24. . . ." Although petitioner asserts in its brief that the motion was orally made and allowed at the beginning of the termination hearing, there is no indication of such action in the record before us. Nor is there any indication that the written motion was served on respondent. By order dated 24 January 1985, the motion was allowed and the caption of the petition was amended *nunc pro tunc* from the date of its original filing. Respondent contends that allowance of the motion without notice to her was prejudicial error.

G.S. 7A-289.25 provides that a petition for termination of parental rights "shall be entitled 'In re (Last name of child), a minor child' . . . ." The petition in this action was so captioned. The balance of the caption, naming petitioner and respondents, was not required by the statute and we consider it surplusage. Therefore, the order permitting the caption to be amended resulted in no prejudice to respondent.

Respondent further contends, however, that the petition for termination of parental rights was invalid and should have been dismissed because it was filed by a party not authorized to maintain such an action. G.S. 7A-289.24 limits the persons or agencies who may petition for termination of parental rights. A county

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*In re Manus*

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department of social services, to whom custody of a child has been given by court order, has standing to maintain such an action. G.S. 7A-289.24(3). G.S. 7A-289.25(2) provides that the petition must set forth "[t]he name and address of the petitioner and facts sufficient to identify the petitioner as one entitled to petition under G.S. 7A-289.24."

The petition filed in the present case alleged:

2. That the name of the petitioner is H. Gene Herrell, and he is Director of the Union County Department of Social Services, and petitioner's address is Union County Department of Social Services, Union County Courthouse, Monroe, North Carolina 28110. Petitioner is entitled to petition for termination of parental rights under G.S. 7A-289.24(3) in that custody of the child Crystal Lynn Manus was surrendered to the Union County Department of Social Services by immediate custody order of Judge Donald R. Huffman dated January 21, 1983 . . . , and the custody of Carolyn Irene Manus was surrendered to the Union County Department of Social Services by immediate custody order of Judge Kenneth W. Honeycutt dated August 25, 1983 . . . , and the children have remained in the legal custody of the Union County Department of Social Services since those dates.

Respondent's argument is that the foregoing allegations establish that H. Gene Herrell, as an individual, is the petitioner and that the allegations do not establish that he is entitled, as an individual, to petition for termination of parental rights. We reject her argument. Even though the allegations of capacity may have been inartfully drafted, it is still readily apparent that Mr. Herrell did not petition for termination of respondents' parental rights in his capacity as an individual, but rather in his capacity as Director of DSS and, therefore, on behalf of DSS. The allegations are, in all respects, sufficient to establish that DSS is a party entitled to petition for termination of respondents' parental rights in these children pursuant to G.S. 7A-289.24(3).

Moreover, even if we were to decide that the allegations are insufficient to show that the petition was brought by DSS, the real party in interest pursuant to G.S. 7A-289.24(3), dismissal of the petition would not be warranted. G.S. 1A-1, Rule 17(a) provides, in part:

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*In re Manus*

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No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Rule 17(a) deals not only with real party in interest questions, but also with questions relating to capacity to maintain an action. *Burcl v. N.C. Baptist Hospital, Inc.*, 306 N.C. 214, 293 S.E. 2d 85 (1982). While this Court has held that the Rules of Civil Procedure are not superimposed upon the procedures set forth by statute for termination of parental rights, *In re Clark*, 76 N.C. App. 83, 332 S.E. 2d 196 (1985); *In re Pierce*, 53 N.C. App. 373, 281 S.E. 2d 198 (1981); *In re Allen*, 58 N.C. App. 322, 293 S.E. 2d 607 (1982); it has also said that the Rules are not to be ignored. *Clark, Allen*. Indeed, each of the cited cases involved application of the Rules of Civil Procedure in addressing errors assigned to termination proceedings. *Clark, supra* (service of process under Rule 4j); *Allen, supra* (entry of written order proper under Rule 58); *Pierce, supra* (judgment properly corrected under Rule 60(a)).

The record does not reflect that respondents raised any question in the trial court with respect to Mr. Herrell's capacity to petition as director of DSS for termination of their parental rights. The petition provided respondents with full notice of the transactions and occurrences upon which the petition for termination was based. Because, for reasons hereinafter stated, we must vacate the order entered by the trial court and remand this case for further proceedings, we specifically hold that respondents are not entitled to a dismissal of the petition by reason of the erroneous designation of Mr. Herrell as petitioner. They can in no way be prejudiced by permitting DSS to ratify the petition and be substituted as petitioner.

[2] We turn now to a consideration of respondent Mullis' substantive arguments. The petition sought to terminate respondents' parental rights upon two grounds: (1) that the minor children were neglected, (2) that neither respondent had paid a reasonable portion of the cost of support of the children while in DSS custody. The trial court, in its order terminating respond-



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**In re Manus**

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ents' parental rights, found the following facts pertinent to those allegations:

8. That the Court takes judicial notice of the previous orders entered in this case pertaining to the neglect of the minor children dated January 11, 1983; January 25, 1983; February 7, 1983; and January 12, 1984.

9. The Court also finds that Crystal Lynn Manus has been left in the care of her maternal grandmother, Dorothy Mullis, on various occasions when the father was drinking, and the mother would leave the child in the care of the maternal grandmother for indeterminate periods of time while she attempted to find the father. During these periods, the mother often left no money for food, Pampers, or other necessities nor made provision for these necessities for the minor child, Crystal. The maternal grandmother ultimately told the respondent-mother that she could no longer care for the children under these conditions.

. . . .

11. That the children have had one extended visit with their parents over the 1983 Christmas holiday, and at the beginning of the visit, the mother was advised that Crystal had been exposed to chicken pox and to watch for symptoms of chicken pox in case Crystal had contracted the disease. At the termination of the visit, the mother advised the foster mother that Crystal was fine and exhibited no symptoms of the disease, and upon return of the child to the foster mother, the foster mother determined that the child had a fever and had evidence of chicken pox over a large part of her body and was exhausted when returned to the foster parent. Also during this visit, Carolyn had a fever when she was returned to the foster parent, and of the two medications which were given by the foster parent to the respondent-mother at the beginning of the visit, no medication had been given out of one bottle, and only a small amount was apparently used out of the second bottle. Specific instructions were given to the mother regarding dosage and use of the medication.

12. That during the time that these children have been in the custody of the Union County Department of Social

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*In re Manus*

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Services, the parents have not maintained contact with the Department of Social Services on a regular basis and have not maintained permanent living arrangements over a large part of the time. During the period of time that the children have been in the custody of the Union County Department of Social Services, both parents have been able-bodied and able to work except for the period of time that the mother was pregnant with Carolyn.

13. The respondent-father has been working for Bill Hefner Construction Company for the last three months doing remodeling work, making approximately \$8.00 per hour and averaging 40 hours per week. Prior to that, he worked for Metric Construction Company for approximately four months, averaging approximately \$8.00 an hour and working approximately 40 hours per week. Prior to that, he worked for Price-Mullis for approximately one year and averaged approximately \$100.00 per week. He has been regularly employed since January of 1983 and has had an automobile all during this period of time, with the exception of the last month or so when the automobile incurred mechanical problems. The respondent-father's living expenses have been for rent which is currently \$340.00 per month and food and clothing for himself and Teresa Georgette Mullis. He has two other children whom he does not support on a regular basis. He has given \$100.00 to his son recently to repair a car and \$100.00 each to two other minor children. He has visited with Crystal and Carolyn twice since June of 1984 and has not contacted the Union County Department of Social Services at all nor kept them informed of his whereabouts as provided for in the parent-agency agreements.

14. Respondent-mother has been working off and on since the birth of Carolyn Irene Manus on June 13, 1983. She has paid a total of \$10.00 child support since the children have been in foster care and states that she does not feel that she should have to support her children unless they are in her care. She has never voiced a similar objection to the Union County Department of Social Services staff worker prior to her testimony in court. She currently works for David Manus in conjunction with his employment with Bill Hefner Construction Company. Prior to that, she worked

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In re Manus

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with Westbury Knitting Mills during the summer of 1984, and Johnston Spinning Mills for two to two and a half months prior to that. Before her employment with Johnston Spinning Mills, she worked for a few days with S & F Knitting shortly after the birth of the minor child, Carolyn Irene Manus. She has visited with her children approximately six to seven times since June of 1984. She has not kept the Union County Department of Social Services staff apprised of her residence, and they have been unable to locate her at various periods of time.

15. The father has paid a total of \$1,225.00 in support for the minor children since April 19, 1984, under the court-ordered support of \$50.00 a week for Crystal Manus. Prior to April of 1984, he had paid a total of \$475.00 in support for Crystal Lynn Manus since October 19, 1983. He has made no support payments which have been attributable directly to Carolyn Irene Manus, and all support payments made to the Union County Clerk of Superior Court's Office have been directed to Crystal Lynn Manus per a court order entered in Union County Criminal Court.

16. The reasonable cost of care of each of the minor children is between \$200.00 and \$250.00 per month for food, clothing, and shelter.

17. The respondent-parents have from time to time entered into various parent-agency agreements with the Union County Department of Social Services, all of which have generally provided for suitable housing for the children, maintaining employment, paying reasonable support for the children, and reasonable visitation for the children. The parents have been apprised of their support obligation and have failed to meet their legal obligation of support for the minor children.

Based on these findings, the trial court concluded that respondents "have neglected" Crystal and Carolyn, and that respondents failed to pay a reasonable portion of the cost of care of the children while in DSS custody.

G.S. 7A-289.32 provides for the termination of parental rights if:

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*In re Manus*

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(2) The parent has abused or neglected the child. The child shall be deemed to be . . . neglected if the court finds the child to be . . . a neglected child within the meaning of G.S. 7A-517(21).

. . . .

(4) The child has been placed in the custody of a county department of social services . . . and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.

A neglected child is one who "does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law." G.S. 7A-517(21). Respondent Mullis contends that the findings do not support the trial court's conclusion that Crystal and Carolyn were neglected children within the meaning of G.S. 7A-289.32 and 7A-517(21). We agree.

Our Supreme Court has held that "evidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights." *In re Ballard*, 311 N.C. 708, 715, 319 S.E. 2d 227, 232 (1984). However, "termination of parental rights for neglect may not be based solely on conditions which existed in the distant past but no longer exist." *Id.* at 714, 319 S.E. 2d at 231-32. "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding.*" *Id.* at 715, 319 S.E. 2d at 232 (emphasis original). This Court has held that "[t]he key to a valid termination of parental rights on neglect grounds where a prior adjudication of neglect is considered is that the court must make an *independent* determination of whether neglect authorizing the termination of parental rights existed *at the time of the hearing.*" *In re McDonald*, 72 N.C. App. 234, 241, 324 S.E. 2d 847, 851, *disc. rev. denied*, 314 N.C. 115, 332 S.E. 2d 490 (1985) (emphasis added).

In the present case, the trial court's Finding of Fact No. 9 is based upon evidence of neglect which occurred before respondent

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In re Manus

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Mullis lost custody of Crystal. The only other findings with respect to respondent Mullis' neglect of either child are contained in Findings of Fact Nos. 8 and 11 and are based upon events which occurred more than a year before the termination hearing. Although the evidence is certainly relevant to the issue of neglect, it is insufficient, without more, to support termination on that ground. "Both the existence of the condition of neglect and its degree are by nature subject to change." *In re Ballard, supra* at 715, 319 S.E. 2d at 232. Thus, the trial court must consider any evidence of a change in conditions and determine whether the prior neglect still exists or is likely to recur. *Id.*

Petitioner argues that respondents have the burden of showing a change in conditions and that respondent Mullis came forward with no evidence that the previous conditions had improved. We disagree with both arguments. "The petitioner seeking termination bears the burden of showing by clear, cogent and convincing evidence that such neglect exists at the time of the termination proceeding." *Id.* at 716, 319 S.E. 2d at 232. In the present case, respondent Mullis offered evidence tending to show that she was attempting to improve the conditions which had led to removal of her children and that she was making some progress in doing so. Petitioner offered some evidence to the contrary. From our review of the order, however, it is apparent that the trial court based its conclusion of neglect on its findings relative to past conditions and made no determination resolving the conflicts in the evidence as to whether conditions existing *at the time of the hearing* were indicative of a probability of continued neglect or whether the previous neglect had ameliorated. For that reason, we hold that the trial court found insufficient facts to support its conclusion that these minor children are neglected children and its order terminating respondent Mullis' parental rights on that basis.

[3] Respondent Mullis' parental rights were also terminated upon the additional ground, provided by G.S. 7A-289.32(4), that she had failed to pay a reasonable portion of the cost of their care while they were in DSS custody. The trial court made a finding as to the reasonable cost of each child's care, but made no finding as to what portion of that cost was a reasonable amount for respondent Mullis to pay. "A parent's ability to pay is the controlling characteristic of what is a 'reasonable portion' of cost of foster

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**Stevens v. Nimocks**

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care for the child which the parent must pay. A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay." *In re Clark*, 303 N.C. 592, 604, 281 S.E. 2d 47, 55 (1981). Although the court found that respondent Mullis had worked "off and on" since July 1983, there were no findings with respect to her ability to pay. The failure of the trial court to make the requisite findings makes it necessary that we vacate the action of the trial court terminating respondent Mullis' parental rights on this ground also. *In re Ballard*, *supra*.

The order of the trial court terminating the parental rights of respondent Teresa Georgette Mullis is vacated and this cause is remanded to the District Court of Union County for further proceedings not inconsistent with this opinion.

Vacated and remanded.

Judges PHILLIPS and PARKER concur.

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JOHN FINTON STEVENS v. STEPHEN H. NIMOCKS AND JOHN TAYLOR, INDIVIDUALLY, AND D/B/A NIMOCKS AND TAYLOR, AND NIMOCKS AND TAYLOR, A PARTNERSHIP

No. 8512SC1047

(Filed 5 August 1986)

**1. Partnership § 6— verification of answer as partner—no individual liability**

Defendant's motion for summary judgment based on the statute of limitations was properly granted in a malpractice action in which defendant was sued only as a member of a partnership and his partner was sued individually and as a partner where the claim against the other attorney was discharged in bankruptcy, plaintiff amended his complaint to add defendant as an individual after the running of the statute of limitations, and defendant had verified the original answer within the period of the statute of limitations. Defendant's verification of the original answer when he was sued in his partnership capacity does not subject him to individual liability. N.C.G.S. § 59-45, N.C.G.S. 1A-1, Rule 4(j)(7)b.

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Stevens v. Nimocks

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**2. Limitation of Actions § 12.3— defendant sued as partner within statute of limitations—added as individual after running of statute of limitations—no relation back**

An amendment to plaintiff's complaint adding defendant individually did not relate back to the filing of the original action and was barred by the statute of limitations where defendant was not added as an individual until more than seven years after the alleged acts of his former partner, who had since been discharged in bankruptcy. The amendment which added defendant was tantamount to the addition of a new party. N.C.G.S. § 1A-1, Rule 15(c).

APPEAL by plaintiff from *Farmer, Judge*. Judgment entered 22 April 1985 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 4 March 1986.

*John H. Bisbee and Barry Nakell for plaintiff appellant.*

*Boyce, Mitchell, Burns & Smith by Robert E. Smith for defendant appellee Taylor.*

COZORT, Judge.

On 27 August 1980 plaintiff instituted this malpractice action by filing a complaint against Steven H. Nimocks, individually, and Nimocks and Taylor, a partnership. At the time of the institution of this action, the partnership had ceased to exist. The complaint alleged that defendants negligently and improperly advised the plaintiff to plead guilty to a charge of armed robbery in 1977. The complaint was served on defendant, Stephen H. Nimocks and on the defendant partnership by service on Stephen H. Nimocks. The original action was not brought against John Taylor as an individual. Summons was never issued against Taylor in the original action. On 24 October 1980 the defendants filed a verified answer signed by Stephen N. Nimocks and John Taylor. On 24 May 1984 a motion to dismiss defendant Nimocks was granted because the plaintiff's contingent claim against Nimocks had been discharged in bankruptcy. On 26 November 1984 plaintiff made a motion to amend his complaint to add John Taylor individually as a party-defendant. The plaintiff's motion to amend was allowed and the amended complaint was served on Taylor on 22 January 1985. Defendant Taylor moved for summary judgment alleging that the plaintiff's cause of action against him was barred by the statute of limitations contained in G.S. 1-15(c). The trial court allowed Taylor's motion for summary judgment finding plaintiff's

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Stevens v. Nimocks

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cause of action against defendant Taylor was barred by the statute of limitations. Plaintiff appealed. We affirm.

Plaintiff asserts three arguments on appeal: (1) that by verifying the answer in the original action in 1980, Taylor appeared in his individual capacity, thus tolling the statute of limitations; (2) that the amendment of the complaint to add the name of Taylor, individually, as a defendant related back to the filing of the original complaint to satisfy the statute of limitations; and (3) that Taylor, because of his actual notice of this lawsuit and participation in the defense of the action, should be estopped from asserting the statute of limitations as a bar to the action.

[1] We note initially that this is not a matter of misnomer or misdescription of the defendant. Plaintiff admits that he never intended to sue defendant Taylor individually, electing instead to sue Taylor as a partner. Plaintiff sued Taylor individually and served him with process only after the trial court dismissed his action as to defendant Nimocks.

It is well established that each partner in a partnership is jointly and severally liable for a tort committed in the course of the partnership business, and the injured party may sue all members of the partnership or any one of them at his election. See G.S. 59-45; *Dwiggins v. Parkway Bus Co.*, 230 N.C. 234, 52 S.E. 2d 892 (1949); *Shelton v. Fairley*, 72 N.C. App. 1, 323 S.E. 2d 410 (1984), *disc. review denied*, 313 N.C. 509, 329 S.E. 2d 394 (1985). But a partner who is not served with summons is not bound beyond his partnership assets. *Dwiggins, supra*; G.S. 1A-1, Rule 4(j)(7)b. The purpose of this rule is to provide notice of the commencement of an action to the individual partner so that he may protect his interests and "to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit. (Citations omitted.)" *Harris v. Maready*, 311 N.C. 536, 541-42, 319 S.E. 2d 912, 916 (1984).

Plaintiff contends that the defendant Taylor, by verifying the answer in the original action, subjected himself to individual liability. We disagree. Taylor's verification of the original answer was not required by G.S. 1A-1, Rule 11. At the time of the verification Taylor was being sued in his partnership capacity, and his verification was in his capacity as a member of the partnership. Actual notice of a suit against the partnership will not cure the



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Stevens v. Nimocks

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requirement that a partner must be served with a summons to be held individually liable. *Shelton v. Fairley*, *supra*, at 3-4, 323 S.E. 2d at 413; see *Blue Ridge Electric Membership Corp. v. Grannis Brothers*, 231 N.C. 716, 720, 58 S.E. 2d 748, 751-52 (1950) (general appearance on behalf of a purported corporation cannot be construed as a general appearance on behalf of a partnership, none of whose members are a party to the action). We hold that the defendant's verification of the original answer where he was sued in his partnership capacity does not subject him to individual liability.

[2] Plaintiff next contends that the amendment of the complaint to add Taylor individually as a defendant relates back to the filing of the original complaint, thus satisfying the statute of limitations. The statute of limitations is a defense to the plaintiff's action against Taylor unless "relation back" occurs. In the case *sub judice*, the trial court allowed plaintiff's motion to amend to add John Taylor as a defendant; however, the trial court stated that "in entering this order the court has not considered any defenses available to John Taylor." The trial court's granting the motion to amend did not preclude its later considering the defense of the statute of limitations.

G.S. 1A-1, Rule 15(c) provides:

*Relation back of amendments.*—A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

"The amended pleading will therefore relate back if the new pleading merely amplifies the old cause of action, or now even if the new pleading constitutes a new cause of action, provided that the defending party had originally been placed on notice of the events involved.'" *Burcl v. Hospital*, 306 N.C. 214, 224, 293 S.E. 2d 85, 91 (1982), *quoting*, Wachtell, *New York Practice under the CPLR* 141 (1963). In *Callicutt v. Honda Motor Co.*, 37 N.C. App. 210, 245 S.E. 2d 558 (1978), we discussed the issue of whether an amendment to add an additional party-defendant should be granted and whether "relation back" should apply:

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Stevens v. Nimocks

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While we find no North Carolina cases under the Rules of Civil Procedure on this point, we find a number of Federal cases to which we look for guidance. The established rule is that,

'If the effect of the proposed amendment is merely to correct the name of a party already in court, clearly there is no prejudice in allowing the amendment, even though it relates back to the date of the original complaint. (Citations omitted.)

On the other hand, if the effect of the amendment is to substitute for the defendant a new party, or add another party, such amendment amounts to a new and independent clause (*sic*) of action and cannot be permitted when the statute of limitations has run. (Citations omitted) \* \* \* *Kerner v. Rockmill*, 111 F. Supp. 150 (1953). See also *Sanders v. Metzger*, 66 F. Supp. 262 (1946).

*Id.* at 212, 245 S.E. 2d at 560.

Our research reveals no North Carolina cases which deal with the precise issue presented by this appeal. Since North Carolina Rule 15(c) is modeled after Sec. 203(e) of the New York Civil Practice Law and Rules, New York decisions provide guidance for relation back in North Carolina. *Shuford*, N.C. Civ. Prac. & Proc. Sec. 15-8 (2d ed. 1981). Likewise, federal decisions considering the question of whether the original pleading gave notice of a claim set forth in the amended pleading should provide enlightenment. *Shuford*, *supra*.

As a general rule, where a suit is timely brought against a partnership, and individual partners are brought in by amendment after the period of the statute of limitations has run, the statute constitutes a bar as to the partners. 51 Am. Jur. 2d, *Limitations of Actions*, Sec. 282 (1970); *Blue Ridge Electric Membership Corp.*, *supra*, at 721, 58 S.E. 2d at 751. New York courts have held that where a partnership was erroneously sued as a corporation, plaintiffs could not amend the complaint to bring in individual partners who were never served with process and never appeared in the action. *Gray v. H. H. Vought & Co.*, 216 A.D. 230, 214 N.Y.S. 765 (1926). In *Gray*, the court also found that verifica-

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Stevens v. Nimocks

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tion of the answer with a corporate verification, wherein the defendants stated that they were a partnership, did not constitute an appearance by the partners. The court went on to hold that the plaintiff, who waited two years after learning of the existence of the partnership to bring in the defendants as individual partners, was guilty of laches. *Id.*

The federal courts have adopted a three-pronged test for determining whether a party-defendant may be added after the statute of limitations has run.

Rule 15(c) of the Federal Rules of Civil Procedure governs the relation back of amended pleadings involving new parties. The rule includes three prerequisites which must be satisfied before an amendment changing the party against whom a claim is asserted relates back to the date when the original complaint was filed:

- (1) the claim alleged in the amended complaint must arise out of the same occurrence set forth in the original pleadings;
- (2) within the period provided by law for commencing the action against him, the party to be substituted by amendment has received such "notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits"; and
- (3) within the period provided by law for commencing the action against him, the party to be substituted by amendment knew or should have known that, but for a "mistake" concerning the identity of the proper party, the suit would have been brought against him.

*Norton v. International Harvester Co.*, 627 F. 2d 18, 20 (7th Cir. 1980), citing *Simmons v. Fenton*, 480 F. 2d 133, 136 (7th Cir. 1973).

In *Norton, supra*, plaintiff sued the manufacturer of a tractor-trailer, International Harvester, alleging that the levershaft of a truck's steering gear mechanism was defective, and the defect caused an accident resulting in death. TRW manufactured the allegedly defective levershaft. After the applicable statute of limitations had run, plaintiff sought to add TRW as a defendant. The trial court allowed the amendment, despite TRW's objection that the statute of limitations barred the amendment. TRW appealed.

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Stevens v. Nimocks

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Reviewing the three prerequisites for relation back, the Seventh Circuit Court of Appeals found that the first prerequisite had been met because the amended complaint set forth claims arising out of the same occurrence. With regard to the second prerequisite, that within the applicable statute of limitations the party has received notice of the action so that his right to defense will not be prejudiced, the court stated:

[P]rejudice within the meaning of the rule is prima facially established where a party named as an additional defendant in the amended complaint is deprived of the defense of the statute of limitations. *Simmons v. Fenton, supra*. Such prejudice may not come into existence, however, if the added defendant has had sufficient notice of the institution of the action, whether formal or informal, within the limitations period or if a sufficient identity of interest exists between the new defendant and the original one so that relation back would not be prejudicial.

*Norton, supra*, at 20-21. The court found that TRW did not receive actual notice of the suit until after the applicable statute of limitations had run, although TRW had notice of the incident prior to the running of the limitation period. In addition, the court found that, even though TRW was aware of the original complaint before the statute of limitations had run, the complaint did not allege negligence or carelessness in the manufacturing of the steering mechanism itself or name TRW as the manufacturer of the steering gear. The court concluded that although TRW was aware of the pending suit against International Harvester, TRW did not have sufficient notice that it might be named as a defendant. The court also concluded that no "identity of interest" existed between TRW and International Harvester so as to insure that TRW had adequate notice of the suit within the statute of limitations.

In applying the third prerequisite the court stated:

Rule 15(c)(2) permits an amendment to relate back only where there has been an error made concerning the identity of the proper party and where that party is chargeable with knowledge of the mistake . . . . Thus, in the absence of a mistake in the identification of the proper party, it is irrelevant for the purposes of Rule 15(c)(2) whether or not the purported

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Stevens v. Nimocks

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substitute party knew or should have known that the action would have been brought against him.

*Id.* at 22, *quoting Wood v. Worachek*, 618 F. 2d 1225, 1236 (7th Cir. 1980). The court concluded that the plaintiff was not mistaken concerning the identify of TRW; rather, the record indicated that the plaintiff knew the TRW manufactured the defective gear mechanism prior to filing the original complaint and the expiration of the statute of limitations. Plaintiff Norton never alleged she made a mistake or offered any explanation for the three-year delay in naming TRW as a defendant. Thus, the third prerequisite was not met.

Under the facts of this case and with the foregoing legal principles in mind, we conclude that the amendment which added the defendant Taylor was tantamount to the addition of a new party. Although Taylor had knowledge of the original action prior to the running of the three-year statute of limitations, this knowledge alone will not subject him to individual liability after the running of the statute of limitations. The plaintiff in this action chose not to sue Taylor individually in the original action. In 1982, Taylor's former partner was adjudicated bankrupt and the plaintiff's claim against him was discharged in bankruptcy. Plaintiff waited until November of 1984 to add Taylor, more than seven years after the alleged tortious acts of Taylor's former partner occurred. Taylor was clearly prejudiced by this delay. Taylor's participation in this suit as a partner did not mislead the plaintiff in regard to his liability in the suit. We decline to hold that a partner who participates in a malpractice suit by acquainting himself with the facts of the pending suit and notifying his insurance carrier of the suit subjects himself to individual liability when the Rules of Civil Procedure require that he be served with process individually before being held individually liable. Thus, we hold that the plaintiff's amendment adding Taylor individually does not relate back to the filing of the original action and is thus barred by the statute of limitations. The trial court properly granted summary judgment.

Affirmed.

Judges WELLS and WHICHARD concur.

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**State v. White**

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**STATE OF NORTH CAROLINA v. ARTHUR WHITE**

No. 8626SC171

(Filed 5 August 1986)

**1. Searches and Seizures § 34— observation of stereo equipment in parked automobile—no impermissible search**

A police officer's observation of stereo equipment in an automobile and his investigation of the driver's license number marked on the equipment was not so sufficiently intrusive as to amount to a constitutionally impermissible search of defendant's automobile where defendant's automobile was parked in a parking lot generally accessible to the public; the stereo and speakers were situated in the rear seat and were within plain sight through a transparent window of the automobile; the driver's license number marked on the speaker was likewise exposed to public view; it was unnecessary for the officer to enter the automobile or otherwise intrude into any protected space in order to see the number; and defendant thus had no reasonable expectation of privacy in the location in which he placed the items.

**2. Searches and Seizures § 11— warrantless search of automobile—after removal to police station—justified**

The warrantless search of defendant's automobile after it was removed to a police station was justified where an officer's investigation of stereo equipment observed on the back seat of the automobile provided information that the stereo equipment had been stolen; defendant acknowledged ownership of the automobile and claimed its contents; the automobile was apparently capable of being driven; defendant had been informed of the officers' suspicions and could have conceivably contacted someone else to move the automobile or to remove its contents; the stereo equipment was clearly visible from outside the automobile and would have been an inviting target for thieves or vandals while a warrant was being obtained; and the search was conducted within three hours after defendant's arrest and the seizure of the automobile. The right to make a warrantless search and seizure having accrued, it is of no consequence that the search was not conducted at the parking lot.

**3. Criminal Law § 162— disputed value of stolen class ring—no objection at trial—appeal precluded**

Defendant was precluded from raising on appeal the admissibility of testimony concerning the value of a stolen class ring found in defendant's briefcase or the court's recapitulation of conflicting evidence of the value of the ring where defendant did not object at trial. N. C. Rules of App. Procedure, Rule 10(b)(2).

**4. Criminal Law § 34.2— possession of stolen property—testimony concerning cocaine dealing—admission harmless error**

There was no prejudice in a prosecution for possession of stolen property from testimony that defendant was involved with cocaine where the State offered uncontradicted evidence that a large quantity of stolen property taken in

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**State v. White**

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five separate break-ins was found in defendant's automobile parked in front of his apartment; defendant acknowledged ownership of the automobile; and defendant claimed the contents were his. There was no reasonable possibility that any different result would have been reached had defendant's objection been sustained.

APPEAL by defendant from *Griffin, Kenneth A., Judge*. Judgments entered 26 September 1985 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 10 June 1986.

Defendant was charged in separate bills of indictment with five counts of felonious possession of stolen property. The cases were consolidated for trial and a jury returned verdicts finding defendant guilty of felonious possession of stolen property in two cases and nonfelonious possession of stolen property in three cases. The two felony convictions were consolidated for judgment and defendant was sentenced to a ten year active prison term. A consecutive two year term of imprisonment was imposed upon the misdemeanor convictions. Defendant appeals.

*Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Joan H. Byers and Assistant Attorney General John H. Watters, for the State.*

*Goodman, Carr, Nixon & Laughrun, by Theo X. Nixon, for defendant appellant.*

MARTIN, Judge.

The record on appeal lists three assignments of error. Two of the assignments of error are followed by reference to an exception and a page number in the trial transcript, the other assignment of error refers only to page numbers in the transcript. We have searched the record and the verbatim transcript, however, and nowhere therein do any of the exceptions appear except under the purported assignments of error.

Rule 10 of the North Carolina Rules of Appellate Procedure provides, in pertinent part,

(a) FUNCTION IN LIMITING SCOPE OF REVIEW. Except as otherwise provided in this Rule 10, the scope of review on appeal is confined to a consideration of those exceptions set out in the record on appeal or in the verbatim transcript of proceed-

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**State v. White**

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ings, if one is filed pursuant to Rule 9(c)(2), and made the basis of assignments of error in the record on appeal in accordance with this Rule 10. *No exception not so set out may be made the basis of an assignment of error. . . .*

(b) EXCEPTIONS.

(1) *General.* Any exception which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, *may be set out in the record on appeal or in the verbatim transcript of proceedings. . . .* Each exception shall be set out *immediately following the record of judicial action to which it is addressed. . . .* (emphasis added).

Exceptions appearing only under purported assignments of error, and not duly noted in the record as required by the rule, are ineffective. *State v. Lampkins*, 283 N.C. 520, 196 S.E. 2d 697 (1973); *Cratch v. Taylor*, 256 N.C. 462, 124 S.E. 2d 124 (1962) (decided under former Rule 21, Supreme Court Rules of Practice). Nevertheless, we exercise the discretion granted us by Rule 2 of the Rules of Appellate Procedure and consider the errors assigned. We find no error sufficiently prejudicial to warrant a new trial.

At trial, the State offered evidence tending to show that during the early morning hours of 19 January 1985, Officer S. A. Sweet and other officers of the Charlotte Police Department conducted a search of an alleged "liquor house" in the 1100 block of Belmont Street in the City of Charlotte. Upon completion of the search and return to their police cars, the officers discovered that the tires on each of the cars had been cut or slashed. The officers "fanned out" in the neighborhood in an attempt to locate the person or persons responsible or to locate persons who might be able to provide information. Officer Sweet proceeded across Belmont Street and into the parking lot of an apartment complex. Using his flashlight, the officer was looking around, underneath and inside the parked automobiles in the event that a suspect was hiding there. In the course of doing so, Officer Sweet shined his light inside a Lincoln automobile and noticed a stereo turntable and some speakers in the back seat. A North Carolina driver's license number was marked on the back of one of the speakers. Using his portable radio, Officer Sweet called police headquarters



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**State v. White**

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to determine to whom the driver's license number had been issued. After a brief investigation, Officer Sweet was informed that the stereo and speakers belonged to Helen Carpenter and had been stolen from her residence during a break-in on 17 January 1985.

Officer Sweet and another officer then knocked on the door of the apartment directly in front of where the Lincoln was parked. Defendant answered the door and, upon inquiry, informed the officers that the Lincoln belonged to him. When asked about the stereo and speakers, he told the officers, "that's my stuff." The officers then placed defendant under arrest, along with another person, John Welch, who emerged from defendant's apartment and claimed that the stereo equipment had been given to him by his grandmother three months previously.

After defendant had been arrested, the Lincoln automobile was towed to the basement of the Law Enforcement Center. Approximately three hours later the automobile was opened and searched. The search revealed the stereo turntable and speakers, as well as a microwave oven, which had been stolen from Helen Carpenter and a briefcase containing numerous items of jewelry, pawn slips, antique coins, papers, and currency. The items included a Duke University class ring which had been stolen during a break-in of John Miller's residence on 10 January 1985, rings stolen during a break-in of Janet Fuller's residence on 2 January 1985, a ring stolen during a break-in of Terry Slezak's residence on 4 January 1985, and rings stolen during a break-in of Janet Copeland's residence on 30 August 1984. Defendant offered no evidence.

Prior to trial, defendant moved to suppress the evidence of the items found in his automobile, contending that the seizure of the automobile and the subsequent search violated his rights under the Fourth Amendment to the United States Constitution. After a hearing conducted before the jury was empaneled, the trial court made findings of fact and concluded that neither the seizure of the automobile nor the subsequent search thereof was constitutionally invalid. Defendant first assigns error to the denial of his motion to suppress.

[1] We must first determine whether Officer Sweet's observation of the stereo equipment, and driver's license number marked

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State v. White

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thereon, through the window of defendant's automobile amounted to an unreasonable intrusion into an area in which defendant had a reasonable expectation of privacy. We hold that it did not. "[T]he State's intrusion into a particular area whether in an automobile or elsewhere, cannot result in a Fourth Amendment violation unless the area is one in which there is a 'constitutionally protected reasonable expectation of privacy.'" *New York v. Class*, --- U.S. ---, ---, 89 L.Ed. 2d 81, 89, --- S.Ct. ---, --- (1986) (quoting *Katz v. United States*, 389 U.S. 347, 360, 19 L.Ed. 2d 576, 88 S.Ct. 507 (1967) (Harlan, J., concurring)). In *Katz*, the Court described the safeguards conferred by the Fourth Amendment as protection of "people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection [citation omitted]. But what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected." *Katz*, 389 U.S. at 351, 19 L.Ed. 2d at 582.

In the present case, defendant's automobile was parked in a parking lot generally accessible to the public. The stereo and speakers were situated in the rear seat and were within the plain sight, through the transparent window of the automobile, of anyone who passed by the exterior of the automobile. Defendant thus had no reasonable expectation of privacy in the location in which he placed the items. The driver's license number marked on the speaker was likewise exposed to public view; it was unnecessary for Officer Sweet to enter the automobile or otherwise intrude into any protected space in order to see the number. We hold that neither the observation of the stereo equipment, nor the investigation of the driver's license number marked thereon, was sufficiently intrusive as to amount to a constitutionally impermissible search of defendant's automobile. See *State v. Boone*, 293 N.C. 702, 239 S.E. 2d 459 (1977); *State v. Baker*, 65 N.C. App. 430, 310 S.E. 2d 101 (1983), *cert. denied*, 312 N.C. 85, 321 S.E. 2d 900 (1984).

[2] After their investigation provided them with the information that the stereo equipment had been stolen from Helen Carpenter, and upon their inquiry, defendant acknowledged ownership of the automobile and claimed the contents, the officers had 1) probable cause to arrest defendant for possession of stolen property, and 2) probable cause to believe that the automobile contained evidence

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State v. White

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of criminal conduct, and therefore, probable cause to conduct a search. *See Chambers v. Maroney*, 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975, *reh'g denied*, 400 U.S. 856, 27 L.Ed. 2d 94, 91 S.Ct. 23 (1970); *State v. Jones*, 295 N.C. 345, 245 S.E. 2d 711 (1978). The officers did not, however, search the car at that time; they elected instead to seize it and tow it to police headquarters. The subsequent search of the automobile, which yielded the other stolen items, cannot therefore be justified as a search incident to defendant's arrest. *Chambers, supra*; *State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973). In order to justify the seizure and subsequent warrantless search of the automobile, exigent circumstances must have existed at the time of its seizure. *Chambers, supra*; *Jones, supra*. "There is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure." *United States v. Johns*, 469 U.S. ---, ---, 83 L.Ed. 2d 890, 896, 105 S.Ct. --- (1985).

[W]here probable cause exists to search an automobile and circumstances warrant removing it for a search at some other location, such as the police station, the "exigent circumstances" requirement is satisfied and a warrantless search may be conducted within a reasonable time at the location to which the automobile is removed.

*Jones, supra* at 354, 245 S.E. 2d at 716.

In our view, exigent circumstances existed in the present case which would have justified an immediate warrantless search of defendant's automobile in the parking lot, and which did justify its seizure and removal to the police station. The automobile was apparently capable of being driven; defendant had been informed of the officers' suspicions and could have conceivably contacted someone to move the automobile or remove the stolen items therefrom. The stereo equipment was clearly visible from outside the automobile and was an inviting target for thieves or vandals, that equipment and the other contents of the automobile could have been stolen from it while a warrant was being obtained. The right to make a warrantless search and seizure having accrued, it is of no consequence that the search was not conducted at the parking lot; the officers could search the vehicle at the parking lot or could seize it and search it at police headquarters. *State v. Mitchell*, 300 N.C. 305, 266 S.E. 2d 605 (1980), *cert. denied*, 449

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**State v. White**

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U.S. 1085, 66 L.Ed. 2d 810, 101 S.Ct. 873 (1981). The search, which occurred within three hours after defendant's arrest and the seizure of the automobile, was conducted within a reasonable time. In light of all of the facts of this case, we find no constitutional violation in the seizure of defendant's automobile or the subsequent search which disclosed the other items of stolen property. Defendant's first assignment of error is overruled.

**[3]** Defendant's second assignment of error is directed to the admission of testimony of the witness John Miller relating to the value of the Duke University class ring stolen from his residence and found in defendant's briefcase. The trial transcript reveals that defendant did not object to any testimony concerning the value of the ring and, therefore, he is precluded from raising the issue on appeal. *State v. Lucas*, 302 N.C. 342, 275 S.E. 2d 433 (1981). Defendant also contends that because the investigating officer's opinion of the value of the ring differed from that of Miller, the trial court impermissibly expressed an opinion when, in its recapitulation of the evidence, it recited the value given by Miller rather than that given by the officer. Defendant did not object to the instruction and has not otherwise established his right to appellate review of it. N.C. R. App. P. 10(b)(2). See *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983). This assignment of error is overruled.

**[4]** Finally, defendant contends that the trial court erred by permitting the State to offer evidence that he was engaged in criminal activity unrelated to the present charges. During his cross-examination of the detective assigned to investigate the charges, defendant's counsel questioned the officer concerning defendant's business interests. After explaining that his knowledge was based only on what he had heard from other officers, the detective answered that he understood defendant to own a lounge, a convenience store and "a large amount of residence and business in that neighborhood." Not in response to any question the detective volunteered, "The business that I was referring to is not a legitimate business, sir."

On redirect, the prosecutor asked the following question:

Q. Mr. Phelps, you used the term "not a legitimate business" when answering one of Mr. Nixon's questions. What does that relate to?

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State v. White

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MR. NIXON: OBJECTION.

THE COURT: OVERRULED.

A. It relates to cocaine, sir.

Defendant neither testified nor offered evidence of his good character in his own behalf. Therefore, evidence of his bad character or specific wrongful conduct was not admissible to impeach him, under G.S. 8C-1, Rule 608(a) or to rebut evidence of his character, pursuant to G.S. 8C-1, Rule 404(a). The evidence elicited by the State was not indicative of motive, opportunity, intent, preparation, plan, or any of the other purposes for which evidence of other criminal acts is rendered admissible by G.S. 8C-1, Rule 404(b). We reject, as well, the State's contention that defendant had somehow "opened the door" to this testimony by his cross-examination of the detective or by failing to move that the unresponsive statement be stricken. The admission of the evidence suggesting that defendant was involved with cocaine was error.

Not every error in the admission of evidence, however, entitles a defendant to a new trial. *State v. Galloway*, 304 N.C. 485, 284 S.E. 2d 509 (1981). The defendant has the additional burden of showing that he was prejudiced by the erroneous admission of the evidence, i.e., that there is a reasonable probability that a different result would have been reached had the error not been committed. *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983).

In the present case, the State offered uncontradicted evidence that a large quantity of stolen property, taken in five separate break-ins, was found in defendant's automobile parked in front of his apartment. Defendant acknowledged ownership of the automobile and claimed the contents were his. In view of this evidence, we discern no reasonable possibility that any different result would have been reached had defendant's objection been sustained.

No error.

Judges WHICHARD and PHILLIPS concur.

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**Allstate Insurance Co. v. Nationwide Insurance Co.**

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ALLSTATE INSURANCE COMPANY v. NATIONWIDE INSURANCE COMPANY, L. E. BOYKIN, JR., GERALDINE BOYKIN, PAUL MARTINEZ, BRIAN SAVAGE, AND FRANK ASHBURN, ADMINISTRATOR OF THE ESTATE OF STEPHANIE ASHBURN, DECEASED

No. 8510SC1331

(Filed 5 August 1986)

**1. Insurance § 95.1— automobile insurance—notice of cancellation—unambiguous provision—question for court**

A provision in an automobile insurance policy requiring that notice of cancellation be mailed to the insured's "last known address" was unambiguous, and the meaning of such provision should have been determined by the court as a question of law.

**2. Insurance § 95.1— automobile insurance—notice of cancellation to "last known address"**

An automobile liability insurer's mailing of a notice of cancellation to the last residence address provided by the insured complied with policy provisions requiring that notice of cancellation be mailed to the insured's "last known address."

APPEAL by defendant from *Barnette, Judge*. Judgment entered 15 August 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 7 May 1986.

Plaintiff brought this declaratory judgment action seeking a judicial determination of its liability on an automobile insurance policy issued to defendant L. E. Boykin, Jr. (herein Boykin) in December 1979. The car owned by defendant Boykin was involved in a collision on 3 July 1982 in Long Island, New York. Defendant Brian Savage had been driving the car at the time and was, plaintiff alleged, insured by defendant Nationwide Insurance Company. Defendants Geraldine Boykin and Paul Martinez were passengers in the automobile at the time of the accident and sustained personal injuries. Defendant Frank Ashburn is the personal representative of Stephanie Ashburn, who was also a passenger in the automobile. She was killed in the accident.

Plaintiff denied coverage on the ground that it had cancelled defendant Boykin's policy effective 27 June 1982. Defendants asserted that the cancellation was invalid. The trial court granted Nationwide's motion to dismiss on the ground that its presence in the lawsuit was not necessary to a determination of the rights and liabilities of the other parties. The remaining parties went to trial before a jury. At the close of the evidence, the trial court granted the motion of Allstate for a directed verdict on the issue

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Allstate Insurance Co. v. Nationwide Insurance Co.

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of compliance with G.S. 20-310(f), the statutory requirements for cancellation of automobile insurance. No appeal has been taken from this ruling. The issue of compliance with the cancellation provisions in the policy was submitted to the jury, which found Allstate had effectively cancelled the policy. Judgment was entered accordingly and defendants appeal. Additional facts as necessary are set out in the opinion.

*Boyce, Mitchell, Burns and Smith, P.A., by Robert E. Smith and Susan K. Burkhart for plaintiff-appellee.*

*Moore, Ragsdale, Liggett, Ray and Foley, P.A., by Peter M. Foley for defendant-appellant Brian Savage.*

*Hendrick, Zotian and Cocklereece by T. Paul Hendrick for defendant-appellant Geraldine Boykin, individually and as Guardian ad Litem for defendant-appellant Paul Martinez, and defendant-appellant Frank Ashburn, Administrator of the Estate of Stephanie Ashburn, deceased.*

*Blanchard, Tucker, Twiggs, Earls and Abrams by Donald R. Strickland for defendant-appellant L. E. Boykin, Jr.*

PARKER, Judge.

[1] All parties contend, and we agree, that the question of whether plaintiff complied with the contractual requirements for cancellation notice was one of law for the court to decide and should not have been submitted to the jury. *See Riddick v. State Capital Ins. Co.*, 271 F. 2d 641 (4th Cir. 1959). All parties made motions for directed verdict and all were denied. Defendants assign as error the denial of their motions for directed verdict.

The relevant cancellation provision in the insurance policy reads as follows:

2. We may cancel the Liability and Uninsured Motorists Coverages by mailing to the named insured shown in the Declarations at the last known address:
  - a. at least 15 days notice if cancellation is for nonpayment of premium; . . .

Under the facts of this case, the crucial term in the above provision is "last known address." The trial court was of the opinion that the phrase was ambiguous, and under our relevant case law,

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**Allstate Insurance Co. v. Nationwide Insurance Co.**

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submitted the question to the jury for construction of an ambiguous term. *See, e.g., Root v. Allstate Ins. Co.*, 272 N.C. 580, 158 S.E. 2d 829 (1968). However, in our view, the term is unambiguous. The material facts of this case are not contested, and the issue should, therefore, have been determined by the court as a question of law. *See Kent Corp. v. City of Winston-Salem*, 272 N.C. 395, 158 S.E. 2d 563 (1968).

The facts related to the cancellation of Boykin's auto insurance policy are undisputed. Boykin purchased his first insurance policy from Allstate in December 1979. On his application for insurance, Boykin gave his mother's address where he then resided and his work address. These addresses remained in the file kept on Boykin at Allstate's offices in Charlotte after plaintiff converted its records to computer in 1981. In March 1981, Boykin had moved from the address he had originally listed in his application for insurance. Allstate was notified of the change to 1310 Glendale Avenue, Durham, N.C., and issued an endorsement confirming the change of address. This address was the one entered in the computer.

Until 1981, Boykin paid the premiums on his policy annually, at the beginning of the year. In December 1981, he received notice that his next premium payment would be only for a six-month period. Boykin paid the premium amount stated in the letter, but testified he did not realize that it was for six months only.

In April 1982, Boykin moved again, but this time, he neglected to notify Allstate. Boykin testified this failure was due to his mistaken belief that he had paid his insurance for the full year and did not immediately need to notify Allstate of the change. Boykin also testified that he did not notify the post office of his change of address, and he did not pick up any mail that might have been delivered to the old address. His new telephone number was not listed in his name.

On 4 May 1982, Allstate mailed to Boykin's Glendale Avenue address the six-month renewal notice. Boykin never received this notice, and there is no indication in the record that it was returned to Allstate. Then, on 9 June, Allstate mailed its standard Cancellation Notice to Boykin at the same address. This notice was returned to Allstate, unopened. The only effort made by Allstate to locate Boykin was to check a city phone directory. No



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Allstate Insurance Co. v. Nationwide Insurance Co.

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review was made of Boykin's original application on file in Allstate's Charlotte offices which would have revealed the two alternative addresses originally given.

The Cancellation Notice stated that the cancellation would be effective 27 June 1982. The fatal collision occurred less than a week later, on 3 July. Allstate denied coverage, asserting that its cancellation of the policy for nonpayment of premiums had been effective prior to the accident.

In order to effectively cancel the policy of insurance, the insurer must comply with the provisions of G.S. 20-310(f), as well as the contractual provisions relating to cancellation contained in the policy. *See Perkins v. American Mut. Fire Ins. Co.*, 274 N.C. 134, 161 S.E. 2d 536 (1968). Failure to comply with these provisions negates the cancellation, and the policy remains in effect. *Id.*; *see also Levinson v. Travelers Indem. Co.*, 258 N.C. 672, 129 S.E. 2d 297 (1963). The issue of compliance with the statutory requirements for cancellation is not before us on this appeal. Therefore, a discussion of those requirements is not necessary.

[2] The policy of insurance required Allstate, in order to cancel the policy, to mail notice of the forthcoming cancellation to the insured's "last known address." The law is settled that strict compliance with the conditions for cancellation is necessary in order to effect a valid cancellation of liability insurance. *See Perkins, supra*; *see generally* 63 A.L.R. 2d 570 (1959), and cases cited therein.

Under Boykin's former annual policy, notice was effective if mailed to "the address shown in this policy." When the policy was changed to a six-month policy, one change required notice to be mailed to the insured's "last known address." Appellant contends that this change is significant and requires more than mailing of notice to just the policy address. We disagree.

The jurisdictions are split as to what satisfies the requirement for mailing to effectively cancel the contract. 17 *Couch on Insurance* 2d § 67:174 (rev. ed. 1983). Some courts have held that when a cancellation notice is returned unopened to the insurer, and the insurer has knowledge of additional addresses for the insured, the insurer must attempt to locate the insured at those additional addresses, including business addresses, in order to ef-

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Allstate Insurance Co. v. Nationwide Insurance Co.

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fectively cancel the policy. See *Breitenbach v. Green*, 186 So. 2d 712 (La. App. 1966); *Griffin v. Gen. Acc. Fire and Life Assur. Co.*, 94 Ohio App. 403, 116 N.E. 2d 41 (1953).

Other courts, however, subscribe to the position that unless the insurer has actual notice of a change of address, mailing to the address in the policy is sufficient. For example, in *Security Ins. Co. v. Smith*, 360 So. 2d 280 (Ala. 1978), the insurer provided general liability coverage for the insured's business. The business changed addresses without notifying the insurance company. The company knew of several addresses where the insured might receive mail, but only one appeared in the policy. Notice of cancellation was mailed to that address. Later, the business at the new address was damaged by fire, and the insurance company denied coverage. The Alabama Supreme Court, holding the cancellation to be effective, said:

Though a party may have several addresses at which he receives mail, for purposes of cancellation of an insurance policy, only one address can be considered "correct." That address is the address listed in the policy unless the insured notifies the insurer of a change of address, or unless knowledge of such *change* is attributed to the insurer. Mere knowledge of *additional addresses* at which an insured receives mail does not constitute knowledge of a change of correct address.

360 So. 2d at 283 (emphasis in original) (citations omitted). *Accord Leatherby Ins. Co. v. Scott*, 51 A.D. 2d 519, 378 N.Y.S. 2d 399 (1st Dept. 1976); *Gendron v. Calvert Fire Ins. Co.*, 47 N.M. 348, 143 P. 2d 462 (1943).

Under North Carolina law, and under the policy language contained in the policy at issue, proper mailing of the cancellation notice is all that is required to cancel the policy. G.S. 20-310(f).

Words in an insurance contract will be given their usual and ordinary meaning. "Last" is defined as "coming after all others in time"; "latest"; "most recent." *Webster's Third New International Dictionary* 1274 (1968). Giving the words their usual and ordinary meaning, we interpret the phrase "last known address" to mean the most recent mailing address known to the insurer. In the case of an individual, absent specific instructions to the contrary from the insured, the mailing address is insured's residence address, as

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**Allstate Insurance Co. v. Nationwide Insurance Co.**

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that is the address where individuals are most likely to receive mail. See *Brumbaugh v. Travelers Indem. Co.*, 396 S.W. 2d 740 (Mo. Ct. App. 1965). In the case at bar, insured testified that when he notified plaintiff of his change of address in 1981, he intended to receive his mail at that address. See *Robbins v. Southern General Ins. Co.*, 243 A. 2d 686 (D.C. 1968). Unless the insured had notified Allstate of his second change of address, or unless Allstate had actual knowledge of the change, mailing of the notice to the last residence address provided by insured was proper and effective.

In North Carolina the law places an affirmative duty on motorists to maintain minimum liability insurance on their vehicles. The public policy underlying this requirement is to assure availability of funds to compensate victims of highway accidents. An insured is charged with knowledge of the contents of his written insurance contract. The policy provision governing cancellation in the instant case placed insured on notice as to how the policy would be cancelled, namely, by mailing notice thereof to insured's "last known address." This Court cannot now rewrite the policy to require mailing to insured's actual address or to all possible addresses for insured. The insurance company complied with the policy requirement.

In view of our conclusions herein, it is not necessary for us to reach defendants' remaining assignments of error relating to errors in the jury instructions.

Since the determinative question was one of law rather than of fact, it was error for the trial judge to deny plaintiff's motion for directed verdict and to submit the issue to the jury. However, since the jury's verdict was consistent with our holding herein, and judgment was entered on the verdict, the judgment for plaintiff is affirmed.

Affirmed.

Judges PHILLIPS and MARTIN concur.

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**State v. Alston**

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**STATE OF NORTH CAROLINA v. BARRY EUGENE ALSTON****No. 8614SC99****(Filed 5 August 1986)****1. Searches and Seizures § 11— warrantless search of person and automobile— evidence properly admitted**

The trial court did not err in a prosecution for armed robbery by admitting into evidence a pistol, marked currency, and a white sweater worn during a robbery, all of which were seized from defendant's person or his automobile, where information known as a result of police radio broadcasts clearly justified the stop of defendant's automobile; a stop and frisk search of defendant's automobile was reasonable because defendant generally matched the description of the person who had committed an armed robbery three hours earlier, defendant was operating an automobile similar to that in which the robber had escaped, he and the automobile specifically matched the description provided by the clerk at a second convenience store where defendant had exhibited suspicious behavior, defendant had quickly gotten out of his car when stopped by an officer and allowed the car to roll back into the police car, and the officer described defendant's conduct as "acting weird"; and officers had probable cause to arrest defendant without a warrant for possession of stolen property after they found the pistol and were entitled to conduct a warrantless search of defendant's person. N.C.G.S. § 14-71.1. Fourth Amendment to the United States Constitution.

**2. Criminal Law § 26.5; Constitutional Law § 34— acquittal of possession of firearm by felon—conviction of armed robbery—no collateral estoppel**

A prosecution for robbery with a firearm was not barred by an earlier acquittal on the charge of possession of a firearm by a felon where defendant had moved to sever the charges since the charge of possession of a firearm by a felon would require proof of a previous conviction of common law robbery, the State had procured both indictments before placing defendant on trial for either charge, and the State made no effort to use one of the charges as a dry run for the other.

APPEAL by defendant from *Brannon, Judge*. Judgment entered 28 August 1985 in Superior Court, DURHAM County. Heard in the Court of Appeals 14 May 1986.

Defendant was charged, in separate bills of indictment, with robbery with a firearm in violation of G.S. 14-87, and with possession of a firearm by a felon in violation of G.S. 14-415.1. Both offenses were alleged to have occurred on 10 December 1984. Defendant entered pleas of not guilty to each offense and moved for severance of the offenses. His motion was allowed, and the State

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State v. Alston

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proceeded to trial upon the armed robbery charge. A mistrial was declared after the jurors were unable to agree upon a verdict.

At a subsequent session of court, defendant was placed on trial for the firearm possession charge and was found not guilty. He then moved for dismissal of the armed robbery charge, contending that the State was collaterally estopped from proceeding due to his acquittal on the firearm possession charge. The motion was denied and, upon retrial of the armed robbery charge, defendant was convicted. From judgment imposing an active 20-year prison sentence, defendant appeals.

*Attorney General Lacy H. Thornburg, by Senior Deputy Attorney General Eugene A. Smith and Associate Attorney Mabel Y. Bullock for the State appellee.*

*Neil M. O'Toole for defendant appellant.*

MARTIN, Judge.

By his assignments of error, defendant presents two issues for our review. The first involves the legality of a warrantless search of defendant's person and automobile at the time of his initial detention and the admissibility of articles seized during the course of that search. The other is whether defendant's acquittal of the firearm possession charge operates as a bar to his prosecution upon the armed robbery charge. We answer each issue adversely to defendant and find no error in his trial.

At trial, the State offered evidence tending to show that on 10 December 1984 at approximately 12:30 a.m. a black male wearing a white sweater draped over his head entered the Seven-Eleven Food Store located on Avondale Drive in Durham, pointed a .38 caliber pistol at the clerk, Jimmy Ellerbee, and demanded money. Mr. Ellerbee opened the cash drawer and placed the money, including a marked \$2.00 bill, into a paper bag and gave it to the man who then turned and left the store. A witness observed him run from the store and enter a light blue compact car. The robbery was reported to Durham police officers, and a description of the robber and the automobile was broadcast over police radio.

John O'Neal, a night clerk at another Seven-Eleven store on North Duke Street, was informed of the robbery by a deputy

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**State v. Alston**

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sheriff. He called Mr. Ellerbee and obtained a description of the robber. Shortly before 3:30 a.m., Mr. O'Neal saw defendant, a black male, drive up to the gasoline pumps in front of the store in a light blue Volkswagen Rabbit. Defendant was wearing a white sweater. Before he entered the store, defendant removed his sweater and threw it in a trash can. He then entered the store and paid for \$3.00 worth of gasoline. Defendant acted as though he was nervous and told Mr. O'Neal that the police were following him and that someone was trying to frame him. Defendant then left the store to pump the gasoline; and while he was outside, Mr. O'Neal called the police. Defendant returned to the store, stayed a short time looking around the store, and then left when another customer came in. As he walked to his car, he retrieved his sweater from the trash can and put it on. He then drove out of the parking lot.

Shortly thereafter, police officers arrived at the store and were provided with a description of defendant, the automobile, and its license number. This information was broadcast over police radio. Within minutes, Officer J. L. Packard observed the light blue Volkswagen on Roxboro Street and stopped the car. Defendant was the driver and only occupant. Other officers arrived on the scene. Officer Packard told defendant why he had been stopped and that he would be detained on suspicion of armed robbery. Defendant consented to a search of his person by the officers, which revealed an amount of currency in his pocket. Officer Packard instructed another officer to search the passenger area of defendant's automobile for weapons. A .38 caliber pistol was found underneath the driver's seat. A check of the serial number of the pistol revealed that it had been reported as stolen. Defendant was placed under arrest for possession of a stolen firearm and was again searched. Currency, including the marked \$2.00 bill taken during the robbery of the Avondale Drive Seven-Eleven store, was taken from defendant's pocket.

Defendant did not testify but offered evidence through the testimony of several witnesses that he was at a private club at the time the robbery occurred.

[1] Prior to trial, defendant moved to suppress the evidence seized during the search of his person and his automobile at the time of his initial detention and subsequent arrest. His first

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State v. Alston

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assignment of error is directed to the denial of his motion and the admission into evidence of the pistol, the currency, and the white sweater. He argues that although the officers may have had a reasonable suspicion of criminal activity sufficient to justify the stop and brief detention of defendant, they did not have probable cause to conduct a search or to arrest him at the time the search of the automobile was conducted. Therefore, he argues, the pistol was the product of an illegal search; and since its discovery gave the officers probable cause to arrest him and to conduct the additional search of his person, the currency and sweater were also tainted and should have been suppressed.

It is now well established that a law enforcement officer may lawfully stop and detain a person where the officer has a reasonable suspicion, based upon personal observation or reliable information, that the person detained has committed a crime, even though the officer may not have probable cause to make a warrantless arrest. *Adams v. Williams*, 407 U.S. 143, 32 L.Ed. 2d 612, 92 S.Ct. 1921 (1972); *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968); *State v. Jackson*, 302 N.C. 101, 273 S.E. 2d 666 (1981); *State v. McZorn*, 288 N.C. 417, 219 S.E. 2d 201 (1975), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1210, 96 S.Ct. 3210 (1976); *State v. Adams*, 55 N.C. App. 599, 286 S.E. 2d 371 (1982). The propriety of the stop and detention depends upon whether the officer acted reasonably in light of the facts known to him at the time. *Adams v. Williams*, *supra*.

The information known to Officer Packard as a result of receiving police broadcasts on his radio clearly justified his stop of defendant's automobile and his detention of defendant for investigative purposes. Having lawfully stopped defendant, Officer Packard and the other officers could permissibly conduct a frisk of his person for weapons, *Terry v. Ohio*, *supra*, as well as the passenger area of his automobile where a weapon might be hidden if the officers had a reasonable belief, based on specific and articulable facts, that defendant posed a danger if permitted to reenter his automobile. *Michigan v. Long*, 463 U.S. 1032, 77 L.Ed. 2d 1201, 103 S.Ct. 3469 (1983). "When a search or seizure has as its immediate object a search for a weapon, . . . we have struck the balance to allow the weighty interest in the safety of police officers to justify warrantless searches based only on a reasona-

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State v. Alston

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ble suspicion of criminal activity." *New York v. Class*, --- U.S. ---, ---, 89 L.Ed. 2d 81, 92, 106 S.Ct. ---, --- (1986).

We conclude that Officer Packard acted reasonably in directing the other officers to conduct a search of defendant's automobile. Defendant generally matched the description of the person who had committed an armed robbery some three hours earlier and was operating an automobile similar to that in which the robber had escaped. He and the automobile specifically matched the description provided by the clerk at the second convenience store, where defendant had exhibited suspicious behavior. When Officer Packard stopped defendant, defendant quickly got out of his car and allowed the car to roll back into the police car. Officer Packard described defendant's conduct as "acting weird." We hold these facts, taken together, sufficient to warrant "an articulable and objectively reasonable belief" that defendant was potentially dangerous. See *Michigan v. Long*, *supra* at 1051, 77 L.Ed. 2d at 1221.

As soon as the search of the passenger area of the car revealed the .38 caliber pistol and the officers determined that it had been stolen, they had probable cause to arrest defendant, without a warrant, for possession of stolen property in violation of G.S. 14-71.1. See G.S. 15A-401(b)(2). Incidental to his lawful arrest, the officers were entitled to conduct a warrantless search of his person. *State v. Hardy*, 299 N.C. 445, 263 S.E. 2d 711 (1980). Neither the pistol, the currency, nor the sweater were obtained by the officers in violation of defendant's Fourth Amendment rights. His first assignment of error is overruled.

[2] By his second argument, defendant contends that his prosecution for robbery with a firearm was barred by his earlier acquittal of the charge of possession of a firearm by a felon. He contends that his acquittal of that offense determined the issue of his possession of a firearm on 10 December 1984 in his favor so as to collaterally estop the State from proving that he committed a robbery with the use of a firearm. We disagree.

The doctrine of collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443, 25 L.Ed. 2d 469, 475, 90 S.Ct. 1189, 1194 (1970). The prin-



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**State v. Alston**

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ciple applies to criminal as well as civil cases and has been held to be a part of the constitutional guarantee against double jeopardy provided by the Fifth Amendment, enforceable against the states through the Fourteenth Amendment. *Id.* The North Carolina Supreme Court has held that collateral estoppel, as applied to a criminal prosecution, "precludes the state from relitigating in a subsequent prosecution any issue necessarily decided in favor of the defendant in the former acquittal." *State v. McKenzie*, 292 N.C. 170, 175, 232 S.E. 2d 424, 428 (1977) (emphasis original).

In *Ashe v. Swenson*, *supra*, defendant was charged with six separate offenses of armed robbery, all arising out of a single incident in which six participants in a poker game were robbed. The prosecution proceeded to trial on one charge, the robbery of one of the victims. Defendant Ashe was acquitted. Several weeks later, Ashe was brought to trial again, this time for the robbery of another of the participants in the poker game. The result of the second trial was a conviction. The Supreme Court reversed his conviction, holding that the "single rationally conceivable issue in dispute before the jury" in the first trial was Ashe's identity as a perpetrator of the robbery. The jury having resolved that issue in defendant's favor, the State was precluded from relitigating the issue in the second trial. *Id.* at 445, 25 L.Ed. 2d at 476, 90 S.Ct. at 1195.

The present case may be distinguished from *Ashe*. In *Ashe*, the State was solely responsible for the consecutive trials. In the present case, defendant moved to sever the charges, contending that a joint trial of the two charges would unduly prejudice him since the charge of possession of a firearm by a felon would require proof of a previous conviction of common law robbery. The State procured both indictments before placing defendant on trial for either charge and made no effort to use one of the charges as a "dry run" for the other. *See Ashe, supra*. In both *Jeffers v. United States*, 432 U.S. 137, 53 L.Ed. 2d 168, 97 S.Ct. 2207, *reh'g denied*, 434 U.S. 880, 54 L.Ed. 2d 164, 98 S.Ct. 241 (1977) and *Ohio v. Johnson*, --- U.S. ---, 81 L.Ed. 2d 425, 104 S.Ct. ---, *reh'g denied*, --- U.S. ---, 82 L.Ed. 2d 915, --- S.Ct. --- (1984), the Supreme Court rejected claims of double jeopardy where separate, rather than consolidated, proceedings were held solely as a result of the defendant's efforts. "[W]here the State has made no effort to prosecute the charges *seriatim*, the considerations of

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**Williams v. South & South Rentals**

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double jeopardy protection implicit in the application of collateral estoppel are inapplicable." *Ohio v. Johnson*, *supra* at --- n. 9, 81 L.Ed. 2d at 434, 104 S.Ct. at ---.

No error.

Judges PHILLIPS and PARKER concur.

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JOE WILLIAMS v. SOUTH & SOUTH RENTALS, INC.

No. 8524SC1219

(Filed 5 August 1986)

**1. Limitation of Actions § 5; Trespass § 3— permanent redress of encroachment on realty—statute of limitations**

Plaintiff's action for permanent redress of defendant's unauthorized taking of plaintiff's land by its construction of an apartment building which encroaches approximately one square foot on plaintiff's land is governed by the twenty-year statute of limitations for adverse possession rather than the three-year statute of limitations for continuing trespass to real property. However, an action to recover for damages to the land caused by construction of the building is governed by the three-year statute of limitations for continuing trespass. N.C.G.S. § 1-40; N.C.G.S. § 1-52(3).

**2. Injunctions § 7.1— encroachment on realty—right to mandatory injunction**

Where it was established that defendant's apartment building encroaches approximately one square foot on plaintiff's land, and defendant is not a quasi-public entity, plaintiff is entitled as a matter of law to a mandatory injunction ordering removal of the encroachment.

Judge WEBB dissenting.

APPEAL by plaintiff from *Pachnowski, Judge*. Judgment entered 31 July 1985 in Superior Court, WATAUGA County. Heard in the Court of Appeals 13 March 1986.

On 1 March 1984, plaintiff filed his complaint in this action alleging (i) that he owned property contiguous on the east to property owned by defendant, (ii) that defendant had constructed a two-story brick and frame apartment building, the northwest corner of which encroaches upon plaintiff's property, (iii) that this trespass is a continuing trespass and (iv) that he has demanded that defendant remove that portion of the building which en-

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**Williams v. South & South Rentals**

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croaches upon plaintiff's property. In his prayer for relief, plaintiff prayed for a mandatory injunction ordering removal of the encroachment.

Defendant's answer, filed 30 March 1984, set forth several affirmative and equitable defenses including the statute of limitations, laches, the equitable burden test and unclean hands. In opposition to plaintiff's motion for summary judgment, defendant filed the affidavit of John B. South, who stated *inter alia* that he and his father are corporate officers of defendant, that they neither were aware of any alleged encroachment until 1984, that upon learning of the alleged encroachment, they informed plaintiff that they wanted no problems with the title, that plaintiff responded that defendant could purchase his adjoining property for a sum in excess of \$45,000.00, and that plaintiff's land has never been used for any purpose, is oddly shaped, is located substantially in a creek bed, is practically unusable and consists of one-fourth to one-third of an acre.

On 31 March 1985, the Honorable Joseph A. Pachnowski entered the following judgment:

THIS CAUSE coming on for trial before the undersigned Superior Court Judge, non-jury, during a regular term of Civil Superior Court in Watauga County and, at the request of counsel for the respective parties, the Court held a Pre-trial Conference in Chambers to review the Court file and contentions of the parties, one such contention or issue raised by the Defendant being that the applicable statute of limitations had expired; the Court thereupon determined that this issue should be resolved before the parties commenced their cases-in-chief for the economy of time and, by consent of the parties, the Court reviewed the Court file, heard testimony, argument of counsel, and makes the following

FINDINGS OF FACT:

1. The Complaint of Plaintiff, Joe Williams, was filed on March 1, 1984.

2. The Complaint alleged in paragraph 4 that a building of Defendant, South & South Rentals, Inc., encroached by approximately one foot onto Plaintiff's land, no date being al-

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Williams v. South & South Rentals

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leged, but that such "trespass is a continuing trespass," no other claims of relief being plead.

3. There was and is an encroachment, and Summary Judgment was entered on such issue, the parties stipulating that all other issues were preserved.

4. The relief sought by Plaintiff was to have the encroachment removed.

5. The encroaching building was constructed in 1975, the year of the original trespass, this fact being uncontested;

6. The encroaching building, consisting of apartments, is permanent in its nature, as opposed to being an intermittent or recurring trespass.

Based upon the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW:

1. The encroachment of Defendant's building is, alleged in the Complaint, a continuing trespass.

2. North Carolina General Statute 1-52(3) is therefore applicable and requires that an action for a continuing trespass "shall be commenced within three years from the original trespass and not thereafter."

3. The Complaint having been filed approximately nine years after the original trespass, Plaintiff's claim for relief is barred by North Carolina General Statute 1-52(3).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's claim be and the same is hereby dismissed, that he take nothing by his action and that he pay the costs of this action, the same to be taxed against him by the Clerk.

DONE AND ORDERED, in open Court on July 31, 1985, and signed this 1st day of August, 1985.

From the entry of this judgment, plaintiff appealed.

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*Williams v. South & South Rentals*

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*McElwee, McElwee, Cannon and Warden by William H. McElwee, III, for plaintiff-appellant.*

*Clement, Miller and Whittle by Chester E. Whittle, Jr., for defendant-appellee.*

PARKER, Judge.

[1] In his first assignment of error, plaintiff contends that the trial judge erred in finding that the encroachment was a continuing trespass, and in his second assignment of error, plaintiff asserts that the trial judge erred in concluding as a matter of law that G.S. 1-52(3) barred plaintiff's claim for relief.

The relationship between application of G.S. 1-52(3), the statute of limitations for a continuing trespass to real property, and G.S. 1-40, the limitations period for adverse possession, was addressed many years ago by our Supreme Court in *Teeter v. Telegraph Co.*, 172 N.C. 784, 90 S.E. 941 (1916). In *Teeter*, defendant had moved its telegraph poles onto plaintiff's property in 1909; the action was commenced in either December 1914 or January 1915; not long before the action was instituted, defendant had repaired a portion of its line and caused further damage and injury to plaintiff's land. Defendant contended on appeal that the action was barred by the three-year statute of limitations, present G.S. 1-52(3). Hoke, J., wrote for the Court as follows:

Speaking to this section in *Sample v. Lumber Co.*, 150 N.C., pp. 165-166, action for wrongful entry and cutting timber on another's land, the Court said: "True, the statute declares that actions for trespass on real estate shall be barred in three years, and when the trespass is a continuing one such action shall be commenced within three years from the original trespass, and not thereafter; but this term, 'continuing trespass,' was no doubt used in reference to wrongful trespass upon real property, caused by structures permanent in their nature and made by companies in the exercise of some *quasi*-public franchise. Apart from this, the term could only refer to cases where a wrongful act, being entire and complete, causes continuing damage, and was never intended to apply when every successive act amounted to a distinct and separate renewal of wrong."

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**Williams v. South & South Rentals**

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Referring to the language of the section and the interpretation of it suggested in that decision, the Court is inclined to the opinion that this is a continuing trespass within the meaning of the law, and for damages incident to the original wrong, and for that alone, no recovery could be sustained. But this is a suit for permanent damages, and on recovery and payment, so far as plaintiff is concerned, confers on the defendant the right to maintain its line on plaintiff's land for an indefinite period and to enter on the same whenever reasonably required for the "planting, repairing, and preservation of its poles and other property." *Caviness v. R.R.*, ante, 305. It is a suit to recover for the value of the easement, which can pass to defendant only by grant or by proceedings to condemn the property pursuant to the statute, Revisal, secs. 1572-1573, or by adverse and continuous user for the period of twenty years.

By analogy, in the case *sub judice*, an apartment building encroaches approximately one square foot on plaintiff's land, hence the encroachment is permanent in nature; since the structure is permanent, the physical trespass is continuous; and the building was built in 1975 more than three years before institution of the action. Therefore, we conclude that this is a continuing trespass and for damages incident to the original wrong, *i.e.*, the construction of the building itself, and for that alone, no recovery can be had. However, like in *Teeter*, *supra*, this action is for something more than damages to the land caused by the construction. The action is to redress defendant's unauthorized taking of the land. While the action sounds in trespass because there is no dispute over title or location of the boundary line, plaintiff seeks a permanent remedy and is subject to the twenty-year statute of limitations for adverse possession.

As noted in *Bishop v. Reinhold*, 66 N.C. App. 379, 311 S.E. 2d 298, *disc. rev. denied*, 310 N.C. 743, 315 S.E. 2d 700 (1984), an action similar on its facts to the case at bar, "[t]o deny plaintiffs a right of action . . . would be to allow the defendants a right of eminent domain as private persons (and without the payment of just compensation) or grant defendants a permanent prescriptive easement to use the plaintiffs' land. This the law will not do, as the defendants have not been in possession for twenty years from 1973, the date the house was constructed." We agree with plain-

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Williams v. South & South Rentals

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tiff that the action for permanent redress is not barred by the statute of limitations.

[2] In his third assignment of error, plaintiff contends that the trial judge erred by failing to enter judgment directing defendant to remove the encroachment. This appeal is from a judgment entered on the statute of limitations; the parties specifically stipulated that defendant's affirmative defenses were preserved. Ordinarily, our ruling on the first two assignments of error would dispose of this appeal, and we would remand for trial on the merits. However, prior findings by the trial court and applicable North Carolina law preclude our granting a new trial. In ruling on plaintiff's motion for summary judgment, the trial judge found as fact that there exists no issue of fact with reference to the boundaries of the plaintiff and defendant's properties and that defendant's building encroaches on plaintiff's property as shown on the plat attached to the affidavit of the registered surveyor.

North Carolina is among those jurisdictions requiring that damages for a continuing trespass be brought in one action. In other words, North Carolina does not recognize successive causes of action for continuing trespass. See *Phillips v. Chesson*, 231 N.C. 566, 58 S.E. 2d 343 (1950), *Cherry v. Canal Company*, 140 N.C. 422, 53 S.E. 138 (1906), and Prosser, *Law of Torts*, § 13 (3rd ed. 1971). However, on the theory that an award of monetary damages for a permanent encroachment is tantamount to condemnation by a private citizen without the right of eminent domain, our courts have permitted permanent monetary damages only in those situations involving quasi-public entities, for example, the telegraph company in *Teeter, supra*. See *Phillips, supra*. Hence the usual remedy for a continuing trespass is a permanent injunction which in this case would be a mandatory injunction for removal of the encroachment. See *O'Neal v. Rollinson*, 212 N.C. 83, 192 S.E. 688 (1937) and *Conrad v. Jones*, 31 N.C. App. 75, 78, 228 S.E. 2d 618, 619 (1976).

We recognize that in today's economic environment with multi-investor ownership of properties having substantial improvements, there may be situations, other than the traditional quasi-public franchise, where sufficient public interest exists to make the right of abatement at the instance of an individual improper, and defendant should be permitted to demand that perma-

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**Williams v. South & South Rentals**

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ment damages be awarded. See *Rhodes v. City of Durham*, 165 N.C. 679, 81 S.E. 938 (1914), D. Dobbs, *Trespass to Land*, 47 N.C. Law Rev. 31 (1968). Where the encroachment is minimal and the cost of removing the encroachment is most likely substantial, two competing factors must be considered in fashioning a remedy. On the one hand, without court intervention, a defendant may well be forced to buy plaintiff's land at a price many times its worth rather than destroy the building that encroaches. On the other hand, without the threat of a mandatory injunction, builders may view the legal remedy as a license to engage in private eminent domain. The process of balancing the hardships and the equities is designed to eliminate either extreme. Factors to be considered are whether the owner acted in good faith or intentionally built on the adjacent land and whether the hardship incurred in removing the structure is disproportionate to the harm caused by the encroachment. Mere inconvenience and expense are not sufficient to withhold injunctive relief. The relative hardship must be disproportionate. Dobbs, *Remedies*, § 5.6 (1973).

Notwithstanding the foregoing discussion, we are compelled by this Court's prior holding in *Bishop v. Reinhold*, *supra*, to hold that since the encroachment and continuing trespass have been established, and since defendant is not a quasi-public entity, plaintiff is entitled as a matter of law to the relief prayed for, namely removal of the encroachment.

Accordingly, we remand this case to the Superior Court for entry of a mandatory injunction ordering defendant to remove that part of its apartment building that sits upon plaintiff's land as shown on the plat contained in the record.

Reversed and remanded.

Judge EAGLES concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. I do not agree with the statement of the majority that "since defendant is not a quasi-public entity, plaintiff is entitled as a matter of law to the relief prayed for, namely removal



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**McNabb v. Town of Bryson City**

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of the encroachment." I believe that the rule stated in *Clark v. Asheville Contracting Co., Inc.*, 316 N.C. 475, 342 S.E. 2d 832 (1986) governs. In determining whether to grant an injunction, the court must consider the relative convenience-inconvenience and the comparative injuries to the parties.

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ROBERT W. McNABB AND WIFE WALLANIA SHELL McNABB v. TOWN OF BRYSON CITY AND CARL H. ARVEY, IN HIS CAPACITY AS CHIEF OF POLICE

No. 8530SC975

(Filed 5 August 1986)

**1. Damages § 13.1— attempted suicide—evidence irrelevant—harmless error**

Assuming that evidence of plaintiff's attempted suicide some six months after the accident in question was irrelevant because plaintiff failed to establish a causal relationship between defendant's negligence and the attempted suicide, the admission of such evidence was not prejudicial error in this case.

**2. Damages §§ 3.4, 13.1— depression caused by accident—admissibility of evidence**

Plaintiff was entitled to recover damages for depression caused by the accident in question, and the trial court properly admitted medical testimony that plaintiff suffered stress and depression as a result of the injuries he received in the accident and a medical bill for the treatment of plaintiff's depression.

**3. Evidence § 29.3— past military medical records—inadmissibility**

Military medical records showing that plaintiff attempted suicide and complained of back pain while in the army in 1972 were not admissible in an action brought by plaintiff motorcycleist to recover for physical and psychological injuries received in a 1983 collision with a police car where defendant town offered no evidence to support its theory that the medical records show that plaintiff's claimed injuries were pre-existing or imagined.

**4. Insurance § 110.1— prejudgment interest—erroneous award against insured**

The trial court erred in awarding prejudgment interest against defendant town rather than against the town's insurer. N.C.G.S. § 24-5.

APPEAL by defendant, Town of Bryson City, from *Hyatt, Judge*. Judgment entered 30 April 1985 in Superior Court, SWAIN County. Heard in the Court of Appeals 17 January 1986.

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**McNabb v. Town of Bryson City**

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*Hunter & Large by Raymond D. Large, Jr., and William P. Hunter for plaintiff appellees.*

*Carter and Kropelnicki by Steven Kropelnicki, Jr., for defendant appellant.*

COZORT, Judge.

Plaintiff Robert W. McNabb sued the Town of Bryson City and its police chief for injuries sustained when the motorcycle he was riding was struck by a police car owned by the Town and being operated by the Police Chief. A jury awarded plaintiff \$77,000 in damages. Defendant Town of Bryson City appeals contending the trial court erred (1) in admitting evidence of plaintiff's attempted suicide in October 1983, some six months after the accident; (2) in excluding plaintiff's military medical records offered by defendant which showed a suicide attempt by plaintiff in 1972; and, (3) in awarding prejudgment interest against the defendant as opposed to defendant's insurer. We affirm the trial court's evidentiary rulings. We reverse the award of prejudgment interest against the Town of Bryson City and remand for entry of prejudgment interest against defendant's insurer. The facts follow.

Plaintiff Robert W. McNabb was riding a motorcycle on U.S. Highway 19 in Bryson City on the morning of 22 April 1983. He was involved in a collision with a police car owned by the Town of Bryson City and being operated by its Police Chief, Carl H. Arvey. Plaintiff was twenty-eight years old and the father of three children at the time of the accident. As a result of the accident, he sustained injuries resulting in permanent impairment of function in his lower back and limitations on his ability to lift, bend, and exert himself. Before the accident, Mr. McNabb was employed as an emergency medical technician with the Swain County Ambulance Service, and he worked part-time in a hospital. He was not able to resume that employment after the accident and did not find other employment until July 1984, when he accepted a job as a jailer at the Swain County Sheriff's Department.

Plaintiff and his wife filed suit against the Town and its police chief on 14 June 1983, alleging negligence. Defendant Town of Bryson City appeals from a jury verdict awarding Mr. McNabb

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**McNabb v. Town of Bryson City**

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\$77,000.00 in damages and his wife \$20,000.00 for loss of consortium. No issues involving the award to the wife are being considered on appeal; thus, all references in this opinion to "plaintiff" refer to Robert W. McNabb, the driver of the motorcycle.

[1] The defendant has not challenged the jury's finding of negligence. The appeal raises evidentiary questions concerning the plaintiff's attempted suicides both before and after the accident. First, we consider defendant's assignments of error concerning the admission into evidence of testimony relating to plaintiff's attempted suicide in October 1983, six months after the accident. Over a continuing objection of defendant, plaintiff was allowed to testify that as a result of the accident he became depressed and took an overdose of pills which resulted in his hospitalization for four or five days and out-patient counseling for a period of time thereafter. Plaintiff took the overdose of pills in October 1983. There is no evidence that plaintiff suffered any physical injuries as a result of the suicide attempt. As a result of this hospitalization and treatment, he received a medical bill in the amount of \$675.00 from Smoky Mountain Mental Health. This bill was admitted into evidence over defendant's objection. On direct examination, however, Dr. Ben Monroe, who treated Mr. McNabb on referral from Smoky Mountain Mental Health, testified that Mr. McNabb had been admitted on a voluntary basis "because he had made several suicidal attempts and suicidal gestures; he had been extremely depressed and that had led to his making some suicidal attempts and suicidal gestures . . . ." Defendant has taken no exception to this testimony by Dr. Monroe. Dr. Monroe further testified that as a result of stress caused by the automobile accident, plaintiff has suffered an adjustment disorder and depression, for which Dr. Monroe treated him. No exception has been taken to this testimony. Defendant, however, objected to and assigns as error the following colloquy between plaintiff's counsel and Dr. Monroe:

MR. LARGE: Doctor, do you have an opinion satisfactory to yourself based on a reasonable degree of certainty and based on years of experience and upon your treatment and observation of Robert McNabb, as to the cause of the mental problems that you have talked about today?

MR. KROPELNICKI: Objection.

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**McNabb v. Town of Bryson City**

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COURT: Overruled.

EXCEPTION No. 20

MR. LARGE: Do you have such an opinion?

DR. MONROE: Yes.

MR. KROPELNICKI: Motion to strike.

COURT: Denied.

EXCEPTION No. 21

MR. LARGE: What is that opinion, Doctor?

MR. KROPELNICKI: Objection, no foundation at all.

COURT: Objection overruled, you may answer the question.

EXCEPTION No. 22

WITNESS: Well, my opinion that the depression that I saw from Mr. McNabb was caused by the—as a result of his injury that he received; the changes that it made in his life; his inability to work and the stress that it placed on his marriage.

Defendant assigns as error the trial court's allowing into evidence plaintiff McNabb's testimony concerning his suicide attempt, the \$675.00 medical bill from Smoky Mountain Mental Health, and Dr. Monroe's opinion as to the cause of defendant's "mental problems." Defendant contends that the admission of this evidence erroneously allowed the jury to consider as an element of damages plaintiff's attempted suicide following the automobile accident and the treatment and medical expenses related to that voluntary act. We find no prejudicial error in the trial court's rulings.

We note initially that the plaintiff is not entitled to recover damages from the defendant for his attempted suicide in this case because under any of the tests currently being advanced, plaintiff's evidence fails to establish a causal relationship between the defendant's wrongful acts and plaintiff's attempted suicide. See *Hall v. Coble Dairies, Inc.*, 234 N.C. 206, 67 S.E. 2d 63 (1951); Annot., 77 A.L.R. 3d 311 (1977). We need not comment further on this point.

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McNabb v. Town of Bryson City

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Accepting for the moment defendant's contention that the \$675.00 medical bill and Dr. Monroe's opinion as to the cause of plaintiff's "mental problems" relate solely to plaintiff's attempted suicide, defendant has failed to show prejudicial error in the admission of Dr. Monroe's testimony and plaintiff's testimony concerning his attempted suicide. It is a fundamental principle of appellate review that an appellant alleging improper admission of evidence has the burden of showing that it was unfairly prejudiced or that the jury verdict was probably influenced thereby, that appellant has been denied some substantial right and that the result of the trial would have been materially more favorable to appellant. *Burgess v. C. G. Tate Construction Co.*, 264 N.C. 82, 140 S.E. 2d 766 (1965); *Royals v. Baggett*, 262 N.C. 541, 138 S.E. 2d 141 (1964); *Collins v. Lamb*, 215 N.C. 719, 2 S.E. 2d 863 (1939); G.S. 8C-1, Rule 103. Assuming that the evidence of plaintiff's attempted suicide was irrelevant because plaintiff did not establish a causal relationship between defendant's negligence and the attempted suicide, we see no prejudice in its admission. Defendant extensively cross-examined the witnesses concerning the October 1983 suicide attempt. The defendant was allowed to extensively cross-examine the witnesses about plaintiff's alleged prior suicide attempt in 1972 to impeach his credibility. Furthermore, plaintiff produced uncontradicted evidence of actual medical expenses amounting to \$6,147.18, excluding the \$675.00 medical bill from Smoky Mountain Mental Health in question, and past and future lost earnings (discounted to present value) of \$75,124.00 caused by the defendant's negligence. The jury awarded the plaintiff only \$77,000.00, less than the amount shown in the uncontradicted evidence, excluding the bill in question.

In sum, defendant has failed to show any unfair prejudice in the admission of evidence concerning the October 1983 attempted suicide. Nor has defendant shown the denial of a substantial right, an improperly influenced jury verdict, or that the result of the trial would have been materially more favorable to it.

[2] We further note, on the question of the admissibility of the \$675.00 medical bill from Smoky Mountain Mental Health and Dr. Monroe's opinion as to plaintiff's mental problems, that this evidence did not concern plaintiff's attempted suicide. The defendant does not contend that plaintiff was not entitled to recover damages for his mental and emotional disturbance (i.e., depression)

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**McNabb v. Town of Bryson City**

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caused by the accident. Under the facts of this case such damages are recoverable. See *Craven v. Chambers*, 56 N.C. App. 151, 287 S.E. 2d 905 (1982); *Wesley v. Greyhound Lines, Inc.*, 47 N.C. App. 680, 268 S.E. 2d 855, *disc. rev. denied*, 301 N.C. 239, 283 S.E. 2d 136 (1980).

A careful review of Dr. Monroe's testimony shows that his opinion was as to the cause of plaintiff's depression. Only at the first of Dr. Monroe's testimony is any mention made of plaintiff's attempted suicide, and that testimony merely relates to background information. Defendant has not excepted to its admission. Thereafter, on direct examination, Dr. Monroe's testimony concerns the stress and resulting depression experienced by plaintiff as a result of the accident and his injuries. With the evidence of psychological injury being admissible, the evidence of treatment for these injuries and medical bills for that treatment was also properly admitted. *Craven v. Chambers, supra*. And, since the \$675.00 medical bill was not put in the record, we cannot determine what portion of it, if any, is attributable to the attempted suicide. The defendant's assignments of error relating to evidence of plaintiff's October 1983 attempted suicide, Dr. Monroe's testimony, and the bill from Smoky Mountain Mental Health are overruled.

[3] Next, defendant assigns as error the trial court's refusal to admit into evidence plaintiff's military medical records from 1972. The record shows that the trial court excluded these records as, among other things, irrelevant. Defendant contends these records, which show plaintiff attempted suicide and complained of back pain while in the army, are relevant because they show "that while Mr. McNabb was in the United States Army, he complained of problems with his back and attempted suicide on at least one occasion, threatening to attempt suicide if he was not released from military service."

The cornerstone of admissibility of all evidence is that it must be relevant. G.S. 8C-1, Rule 402. To be relevant the evidence must have some "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." G.S. 8C-1, Rule 401. Defendant offered no evidence to establish the relevancy of the eleven-year-old medical records to the issues in

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**McNabb v. Town of Bryson City**

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this case: defendant's negligence and plaintiff's damages resulting therefrom. And the relevancy of the offered evidence is not apparent from the records themselves. Defendant offered no evidence to support his theory that the medical records show that the injuries which plaintiff claimed to suffer as a result of the accident were pre-existing or imagined. Defendant extensively cross-examined plaintiff and his medical experts about these medical records in an attempt to cast doubt upon the validity of plaintiff's injuries. This effort proved fruitless, and defendant offered no evidence of its own to connect the eleven-year-old medical records with the injuries plaintiff claimed. What defendant did accomplish through its cross-examination of plaintiff's witness concerning the military medical records was to put before the jury that plaintiff served only a few months in the Army, none of which was overseas, and that Mr. McNabb, in the words of defendant's counsel, "didn't exactly win a Congressional Medal of Honor." We hold the trial court correctly excluded the records of plaintiff's attempted suicide and back pain in 1972.

[4] Lastly, defendant assigns as error the trial court's awarding prejudgment interest against the defendant, Town of Bryson City, rather than its insurer. We agree with the defendant that the trial court should have awarded the prejudgment interest against the defendant's insurer. In *Lowe v. Tarble*, 313 N.C. 460, 329 S.E. 2d 648 (1985), the court interpreted language essentially identical to the language in the defendant's liability policy as including coverage for prejudgment interest under G.S. 24-5 as "costs." We vacate the judgment awarding prejudgment interest against the defendant and remand for entry of judgment awarding prejudgment interest against the defendant's insurer.

Affirmed in part, vacated in part, and remanded.

Judges EAGLES and MARTIN concur.

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**White v. Town of Emerald Isle**

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WALLACE J. WHITE AND WIFE, VIRGINIA M. WHITE; D. L. TILLEY; J. B. SELF, JR.; DAVID A. NORRIS; PAGE C. KEEL, SR. AND WIFE, BETTY G. KEEL; JARVIS B. BRITTEL v. TOWN OF EMERALD ISLE

No. 863SC129

(Filed 5 August 1986)

**Deeds § 20.1— subdivision restrictive covenants—beach access walkway and parking—no violation**

Restrictive covenants did not prohibit defendant's plan for a free, fourteen-space public parking lot and pedestrian ramp providing public beach access where the language of the covenants reserved the right to erect or have erected a walkway, lifeguard stations or stands and other structures commonly associated with the use of ocean beaches and intended primarily for the convenience and safety of persons entitled to use the beach; furthermore, the covenants also specifically allowed hotels, motels and apartment houses and it is common knowledge that parking areas, parking lots and pedestrian ramps providing beach access are incidental to hotels, motels and apartment houses constructed on oceanfront lots.

APPEAL by plaintiffs from *Reid, Judge*. Order entered 6 November 1985 in Superior Court, CARTERET County. Heard in the Court of Appeals 5 June 1986.

Defendant-Town is the owner of three contiguous oceanfront lots in Block Two of Emerald Isle by the Sea as shown on a map recorded in Map Book 3, page 56 in the Carteret County Register of Deeds office. As part of a state program for public use and access to the ocean beaches and public trust areas, defendant-Town applied for and secured a grant for the construction of a public beach access on these three lots. Accordingly, it now seeks to construct on these lots a parking lot and a pedestrian ramp providing public beach access. The parking lot would provide space for fourteen cars. There would be no charge for use of the lot and it would not be operated in conjunction with any commercial use.

Plaintiffs are owners of lots in Blocks One and Two of Emerald Isle by the Sea. Blocks One and Two are subject to restrictive covenants which provide, in pertinent part:

The hereinbefore described property shall be used only for residential purposes and no business or commercial activity shall be engaged in or conducted thereupon except hotels, motels, apartment houses or other buildings for the purpose of providing residence.



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**White v. Town of Emerald Isle**

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The written consent of the owner . . . must be obtained prior to the construction of a hotel, motel or apartment or multiple family dwelling or building, except a duplex or two-family buildings.

. . . .

1.

The ocean beach shall be used only for a recreational area, surf bathing and other uses which are commonly associated with and incidental to the use of ocean beaches.

2.

The ocean beach is to be used by and the use limited to the owners of [all property] located in Blocks Numbers One (1) through Twelve (12), inclusive, of Emerald Isle By-the-Sea. The use of said beach is also extended to those persons who are specifically invited upon the said beaches by those persons owning land within the said Blocks Numbered One (1) through Twelve (12).

. . . .

4.

There is reserved the right to erect or have erected upon the said ocean beach by the Trustee [First Citizens Bank], its successors, assigns or agents, a walkway, commonly known as a boardwalk, [lifeguard] stations or stands and other structures which are commonly associated with the use of ocean beaches and are designated, designed and intended primarily for the [convenience] and safety of persons entitled to use the said beach.

Plaintiffs seek to enjoin defendant-Town, temporarily and permanently, from constructing a parking lot and pedestrian ramp on its property. The trial court concluded that "the use of the Defendant Town's property for a non-commercial parking lot for not more than 14 parking spaces is not a violation of the Protective Covenants in question." Accordingly, it granted defendant-Town's motion for summary judgment. Plaintiffs appeal.

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White v. Town of Emerald Isle

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*H. Buckmaster Coyne, Jr. for plaintiff appellants.*

*Stanley and Simpson, by Richard L. Stanley, for defendant-Town.*

WHICHARD, Judge.

Plaintiffs contend the court erred in granting summary judgment in favor of defendant-Town. Specifically, they contend that the restrictive covenants to which defendant-Town's property in Block Two is subject prohibit its use as a municipal parking lot with a ramp providing beach access. Accordingly, they contend that the court should have granted summary judgment in their favor. We hold that the court properly entered summary judgment for defendant-Town.

In general, a defendant

[i]s entitled to summary judgment only if he can produce a forecast of evidence, which, when viewed most favorably to plaintiff, would, 'if offered by plaintiff at the trial, without more, . . . compel a directed verdict' in defendant's favor. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 473, 251 S.E. 2d 419, 423 (1979). In other words, if the forecast of evidence available for trial, as adduced on the motion for summary judgment, demonstrates that plaintiff will not at trial be able to make out at least a *prima facie* case, defendant is entitled to summary judgment. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981). In such cases there is no genuine issue of material fact. *Moore v. Fieldcrest Mills, Inc.*, *supra*.

*Smith v. Assoc. for Retarded Citizens*, 75 N.C. App. 435, 438-39, 331 S.E. 2d 324, 326 (1985), *quoting Mims v. Mims*, 305 N.C. 41, 286 S.E. 2d 779 (1982). We thus must first determine the use restrictions imposed by the restrictive covenants and then determine whether the forecast of evidence presents any issue of material fact as to whether defendant-Town's plans violated those covenants. *Id.*

In regard to the construction of restrictive covenants, our Supreme Court has stated generally that:

While the intentions of the parties to restrictive covenants ordinarily control the construction of the covenants, . . . such

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White v. Town of Emerald Isle

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covenants are not favored by the law, . . . and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land. . . . The rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent. . . . Even so, we pause to recognize that clearly and narrowly drawn restrictive covenants may be employed in such a way that the legitimate objective of a development scheme may be achieved. Provided that a restrictive covenant does not offend articulated considerations of public policy or concepts of substantive law, such provisions are legitimate tools which may be utilized by developers and other interested parties to guide the subsequent usage of property.

. . . each part of the covenant must be given effect according to the natural meaning of the words, provided that the meanings of the relevant terms have not been modified by the parties to the undertaking. . . . [Citations omitted.]

*Smith*, 75 N.C. App. at 439-40, 331 S.E. 2d at 326, *quoting Hobby & Son v. Family Homes*, 302 N.C. 64, 274 S.E. 2d 174 (1981). *See also Long v. Branham*, 271 N.C. 264, 268, 156 S.E. 2d 235, 238-39 (1967). "The question whether the use of premises for parking purposes infringes a restriction forbidding business use or limiting to residential purposes is dependent upon the particular language used." 20 Am. Jur. 2d Covenants Sec. 220 at 788.

Examining the restrictive covenants here, the trial court concluded:

[I]t appears to be the intention of the original developers executing the Protective Covenants that the Covenants are generally applicable to a residential resort subdivision intended primarily for residential use, but with recreational, surf bathing and other recreational uses being clearly incidental to the use of recreational properties. It also appears to be the intention of the original developers from a review of the Covenants that they were cognizant[t] that many people would be frequenting the ocean beaches, and that owners and their guests, renters and other invitees would be using the dwellings and property subject to the covenants. (Hotels,

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**White v. Town of Emerald Isle**

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motels, apartments and other multiple family dwellings were also contemplated within the property subject to the covenants so that it appears from a review of the covenants that the original developers did not intend to create a private, exclusive residential subdivision. Clearly incidental to the use of residential dwellings, hotels, motels, apartment houses or other buildings for the purpose of providing residences, would be parking areas and parking lots.)

We agree with the trial court's analysis, and we hold accordingly that the restrictive covenants do not prohibit defendant-Town's plan for a free, fourteen-space public parking lot and pedestrian ramp providing public beach access. Our holding is substantially influenced by application of the rule that restrictive covenants must be strictly construed in favor of the unrestrained use of land, *Smith, supra*, to the language of paragraph four of the covenants, which "reserved the right to erect or have erected . . . a walkway, . . . [lifeguard] stations or stands and other structures which are commonly associated with the use of ocean beaches and are designated, designed and intended primarily for the [convenience] and safety of persons entitled to use the said beach." It is common knowledge, of which this Court can take judicial notice, *Opsahl v. Pinehurst, Inc.*, 81 N.C. App. 56, ---, 344 S.E. 2d 68, 77 (1986), that parking lots and pedestrian ramps are "commonly associated with the use of ocean beaches." The uncontroverted forecast of evidence establishes that the proposed parking lot and pedestrian ramp here "are designed and intended primarily for the convenience and safety of persons entitled to use the . . . beach." Therefore, a strict construction in favor of the unrestrained use of land requires a holding that it was not the intention of the original developers that these structures should be precluded by the restrictions on use of the property to residential purposes.

This holding is consistent with prior decisions. In *Long, supra*, plaintiff lot owners sought to restrain defendant lot owner from constructing a street within the parties' subdivision which would connect a street in their subdivision with an adjoining subdivision. The Court held that the restrictive covenants covering the subdivision precluded the road proposed by defendant. 271 N.C. at 274, 156 S.E. 2d at 243. Examining the covenants, the Court concluded that the developers and purchasers of lots in the

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**White v. Town of Emerald Isle**

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subdivision understood that "any use of a lot in the subdivision for a road or right-of-way would violate the restrictions against non-residential use . . . ." *Id.* Specifically, the Court reasoned:

The map of Timbercrest reveals a small, tight subdivision through which only one street, Timberly Drive, meanders. It is quite obvious that its developer and those who purchased lots therein did not contemplate that Timberly Drive should ever become a thoroughfare which would carry traffic from another subdivision. Their objective was a quiet, residential area in which the noise and hazards of vehicular traffic would be kept at a minimum and in which children could play with relative safety.

*Id.* at 274-75, 156 S.E. 2d at 243.

The restrictive covenants here, unlike those in *Long*, specifically allow hotels, motels and apartment houses. Courts take judicial notice of subjects and facts of common knowledge. *Opsahl, supra*. It is common knowledge that parking areas and parking lots and pedestrian ramps providing beach access are incidental to hotels, motels and apartment houses constructed on oceanfront lots. Further, the restrictive covenants specifically provide for the erection of "walkways." Accordingly, plaintiffs and other purchasers of lots in Blocks One and Two of Emerald Isle by the Sea must have understood that the restrictive covenants did not preclude construction of a parking lot or pedestrian ramp. *See Long*, 271 N.C. at 274, 156 S.E. 2d at 243.

We note that Courts in other jurisdictions have held that a municipal parking lot does not violate restrictions against non-residential use. *See, e.g., Burton v. Douglas County*, 65 Wash. 2d 619, 399 P. 2d 68 (1965); *Town of Eastchester v. Koch*, 282 App. Div. 748, 122 N.Y.S. 2d 526 (1953). *Cf. Gordon v. Incorporated Village of Lawrence*, 84 App. Div. 2d 558, 443 N.Y.S. 2d 415 (1981), *aff'd*, 56 N.Y. 2d 1003, 453 N.Y.S. 2d 683 (1982). We note further that we are not confronted with an issue involving the use of a lot restricted to residential purposes as a parking lot for an adjoining business or commercial establishment. *See Tull v. Doctors Building, Inc.*, 255 N.C. 23, 120 S.E. 2d 817 (1961); *Mills v. Enterprises Inc.*, 36 N.C. App. 410, 244 S.E. 2d 469, *disc. rev. denied*, 295 N.C. 551, 248 S.E. 2d 727 (1978).

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**State v. Harper**

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Plaintiffs contend the court erred in making findings of fact not supported by the evidence. In *Mosley v. Finance Co.*, 36 N.C. App. 109, 111, 243 S.E. 2d 145, 147, *disc. rev. denied*, 295 N.C. 467, 246 S.E. 2d 9 (1978), this Court stated:

A trial judge is not required to make finding[s] of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on appeal. Shuford, N.C. Practice and Procedure, Sec. 56-6 (1977 Supp.). Rule 52(a)(2) does not apply to the decision on a summary judgment motion because, if findings of fact are necessary to resolve an issue, summary judgment is improper. However, such findings and conclusions do not render a summary judgment void or voidable and may be helpful, if the facts are not at issue and support the judgment. *Insurance Agency v. Leasing Corp.*, 26 N.C. App. 138, 215 S.E. 2d 162 (1975).

The findings here thus do not render the summary judgment void or voidable. Indeed, given the nature of the case, in this instance they are helpful.

Affirmed.

Judges WEBB and JOHNSON concur.

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STATE OF NORTH CAROLINA v. MONZIE LEROY HARPER

No. 856SC1234

(Filed 5 August 1986)

**1. Automobiles and Other Vehicles § 126.2— driving while impaired—two breathalyzer tests—admissible**

The trial court did not err in a prosecution for driving while impaired by admitting testimony from which the jury could deduce that defendant was administered two breathalyzer tests or by admitting a breathalyzer checklist that revealed two identical alcohol concentrations where both breathalyzer test results were 0.12; defendant did not object or move to strike prior testimony that a sequential breathalyzer test was administered to him; defendant made only a general objection to the breathalyzer checklist and did not bring to the court's attention that the checklist revealed the results of a test;

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**State v. Harper**

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and defendant did not show how the outcome would differ if the checklist had not been published to the jury. N.C.G.S. § 15A-1443(a), N.C.G.S. § 20-139.1 (b3)(3).

**2. Criminal Law § 75.10— driving while impaired—waiver of rights—voluntarily made**

The trial court did not err in a prosecution for driving while impaired by finding that defendant's statements to a highway patrol trooper were knowingly, understandingly and voluntarily made after he had waived his right to silence and his right to counsel where the trooper testified that defendant was apprised of his *Miranda* rights; that after being apprised of his rights defendant understood that anything he said could be used against him; that defendant's mental faculties were only slightly impaired; that in his opinion, defendant was capable of understanding what was said to him; that when defendant was asked whether he wished to waive his right to have an attorney present and answer questions, defendant answered responsively by advising that he did not want a lawyer present; and that defendant waived his rights.

**3. Automobiles and Other Vehicles § 130— driving while impaired—limited driving privilege denied—no error**

Defendant's argument that the trial court denied him a limited driving privilege because he exercised his right to a jury trial was not supported by his exception in the record where there was no ruling of record made by the court to which defendant could except; moreover, the revocation of a license to operate a motor vehicle is not part of nor within the limits of punishment to be fixed by the court wherein a defendant is tried.

APPEAL by defendant from *Stephens, Judge*. Judgment entered 30 May 1985 in Superior Court, HALIFAX County. Heard in the Court of Appeals 10 April 1986.

On 20 January 1985, Trooper C. J. Carmon of the North Carolina Highway Patrol, while on patrol on N.C. 561 in Halifax County, observed an oncoming vehicle cross the centerline of the road. Once the oncoming vehicle passed, Trooper Carmon looked in his rearview mirror and observed the vehicle cross the centerline again. Trooper Carmon gave pursuit and stopped the vehicle. Defendant Monzie Leroy Harper was the driver of the vehicle. Trooper Carmon detected an odor of alcohol about the person of defendant and observed that defendant's eyes were reddish and appeared glassy. Defendant was placed under arrest and transported by Trooper Carmon to the Halifax jail. Sergeant John Wood informed defendant both orally and in writing of his rights prescribed in G.S. 20-16.2. After an observation period of fifteen (15) minutes defendant was asked to perform three (3) physical tests: (1) the one-leg stand test, (2) the heel-to-toe test, and (3) the

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*State v. Harper*

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finger-to-toe test. Defendant was informed of his *Miranda* rights and Sergeant Wood administered two (2) breathalyzer tests to defendant. The two breath samples obtained from defendant contained identical record alcohol concentrations of 0.12. On 1 May 1985, in Halifax County District Court, defendant was convicted of impaired driving. Defendant was given a sixty (60) day suspended sentence, placed on unsupervised probation for one (1) year, and fined \$100.00. The District Court also ordered that defendant pay court costs; that defendant participate in forty-eight (48) hours of community service; and that defendant successfully complete the Alcohol and Drug Education Traffic School (ADETS). Defendant appealed to Superior Court for a trial de novo. On 28 May 1985, defendant's trial began. The jury found defendant guilty of impaired driving and guilty of failing to operate his motor vehicle upon the right side of the highway. Upon defendant's impaired driving conviction the court imposed a level four (4) punishment: defendant was given an active prison sentence of forty-eight (48) hours, a suspended 120 day sentence with a two (2) year supervised probation, a \$250.00 fine, ordered to complete ADETS, and ordered to perform forty-eight (48) hours of community service. The court fined defendant \$10.00 for failing to operate his motor vehicle upon the right half of the highway. Defendant appeals.

*Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Isaac T. Avery, for the State.*

*Hux, Livermon & Armstrong, by James S. Livermon, Jr., for defendant appellant.*

JOHNSON, Judge.

Defendant did not present any argument or authority in support of his first Assignment of Error; therefore, it is deemed abandoned. Rule 28(a), N.C. Rules App. P.

[1] Defendant's second and fourth Assignments of Error pertain to evidentiary rulings of the trial court, whereby defendant contends the trial court committed prejudicial error. Due to the interrelation of Assignments of Error two and four, we shall review them together accordingly. By his second Assignment of Error defendant contends he was prejudiced when the trial court allowed testimony from which the jury could deduce that defendant



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State v. Harper

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was administered two breathalyzer tests. By his fourth Assignment of Error defendant contends that he was prejudiced by the introduction into evidence of a breathalyzer checklist which revealed that the two breathalyzer tests administered to him resulted in identical record alcohol concentration readings of 0.12.

G.S. 15A-1443 contains the codification of the definition of prejudice in North Carolina. In pertinent part G.S. 15A-1443 states the following:

(a) A defendant is prejudiced by errors relating to rights arising other than under the constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. *The burden of showing such prejudice under this subsection is upon the defendant.* Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

G.S. 15A-1443(a) (emphasis supplied). The General Assembly, by enactment of G.S. 20-139.1(b3)(3), restricts the State from seeking to introduce into evidence the higher of two chemical analyses as proof of a defendant's alcohol concentration. We agree with defendant's assertion that G.S. 20-139.1(b3)(3) protects him from a conviction based on the higher of two breathalyzer test results. However, we do not think that it was prejudicial for the court to allow testimony that two breathalyzer tests were administered to this defendant. This is particularly true in the case *sub judice*, since both breathalyzer test results were 0.12. Moreover, defendant did not object or move to strike prior testimony that a sequential breathalyzer test was administered to him. Therefore, defendant waived any objection he may have to the chemical analyst's testimony with respect to the number of tests administered to him. *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983).

Defendant made a general objection when the State sought to publish to the jury, *inter alia*, a breathalyzer checklist that revealed two identical 0.12 record alcohol concentrations. Defendant did not bring to the court's attention that the checklist revealed the results of both tests. Moreover, defendant has not carried his burden of showing how the outcome would differ if the

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**State v. Harper**

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checklist had not been published to the jury. G.S. 15A-1443. Accordingly, defendant's fourth Assignment of Error is overruled.

[2] Defendant next argues that the court erred in finding that his statements to Trooper Carmon were knowingly, understandingly and voluntarily made after he had waived his right to silence and right to counsel. Once a defendant objects to the admission of a confession into evidence it is incumbent upon the trial court to make findings of fact and conclusions of law. *State v. Chamberlain*, 307 N.C. 130, 297 S.E. 2d 540 (1982). Findings of fact made by the trial court, when supported by competent evidence, are conclusive on appeal. *State v. Booker*, 306 N.C. 302, 293 S.E. 2d 78 (1980).

The State must affirmatively show that defendant was fully informed of his rights and voluntarily waived them. *State v. Biggs*, 289 N.C. 522, 223 S.E. 2d 371 (1976). The burden is on the State to prove the voluntariness of a confession by the preponderance of the evidence. *State v. Johnson*, 304 N.C. 680, 285 S.E. 2d 792 (1981). An explicit statement of a waiver is not always necessary to support a finding that defendant waived his right to counsel or the right to remain silent as guaranteed by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). *North Carolina v. Butler*, 441 U.S. 369, 60 L.Ed. 2d 286, 99 S.Ct. 1755 (1979). The voluntariness of a waiver is to be determined by "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L.Ed. 1461, 1466, 58 S.Ct. 1019, 1023 (1938).

The trial court, upon defendant's objection, allowed voir dire and entered appropriate findings and conclusions. The trial court found as fact that prior to interrogation defendant was advised of his constitutional rights against self-incrimination; that defendant acknowledged to Trooper Carmon that he understood each right as previously read and explained; that thereafter defendant voluntarily made a statement and answered questions posed by Trooper Carmon; that defendant at no time requested the right to remain silent or requested the presence of counsel or requested that counsel be appointed or requested that any interrogation cease; that defendant appeared to Trooper Carmon to have a slight impairment of his normal faculties to understand the

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**State v. Harper**

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nature of the warnings and to intelligently waive his rights; that defendant by his words and conduct, after acknowledging that he understood all of his constitutional rights, waived those rights by voluntarily answering questions posed by Trooper Carmon; and that defendant was not threatened, promised or coerced in any manner during this interview and his statements were knowingly, understandingly and voluntarily made. Based upon its findings the court found an implied waiver under *State v. Connley*, 297 N.C. 584, 256 S.E. 2d 234 (1974), and concluded as a matter of law that "no constitutional right of the defendant was violated and that the defendant's statements to Officer Carmon were knowingly, understandingly and voluntarily made after he had waived his right to silence and right to counsel."

The pertinent testimony elicited from Trooper Carmon during voir dire supports the court's findings. Trooper Carmon, an eight year veteran, testified that defendant was apprised of his *Miranda* rights; that after being apprised of his rights defendant understood that anything he said could be used against him in a court of law; that "defendant's mental faculties were only slightly impaired"; that in his opinion defendant was capable of understanding what was said to him; that when defendant was asked whether he wished to waive his right to have an attorney present and answer questions, defendant answered responsively by advising him that he did not want a lawyer present to answer the questions; that defendant waived his rights. We hold that the findings of fact made by the trial court were supported by competent evidence in the record and are therefore binding on this appeal. We further hold that the trial court's findings supported its conclusion of law that defendant's constitutional rights were not violated when he waived his rights and voluntarily answered the questions posed to him.

[3] Defendant's final argument is that the trial court denied him a limited driving privilege because he exercised his right to a jury trial. Defendant did not present any authority in support of his argument. Moreover, we find no basis in the record for asserting that defendant was denied a limited driving privilege. On page forty (40) of the trial transcript where defendant requested limited driving privileges and where defendant's exception is noted, we found the following:

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**Baker v. Mauldin**

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THE COURT: Well, Mr. Livermon, I will take your request under consideration. . . .

The proceedings were closed with the following colloquy between the court and defense counsel:

THE COURT: I will take your request under advisement. I don't know how I am going to rule on it.

Mr. Livermon: Thank you, sir.

(Whereupon these proceedings were closed at 2:54.)

The exception noted by defendant does not provide a basis for his Assignment of Error. There is no ruling of record made by the court for defendant to except to. Finally, we note that the revocation of a license to operate a motor vehicle is not part of, nor within the limits of, punishment to be fixed by the court wherein a defendant is tried. *Harrell v. Scheidt*, 243 N.C. 735, 92 S.E. 2d 182 (1956).

No error.

Judges ARNOLD and WHICHARD concur.

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MARY M. BAKER, ADMINISTRATRIX OF THE ESTATE OF JAMES REGINALD HICKMAN v. ROBERT EDWARD MAULDIN

No. 8611SC180

(Filed 5 August 1986)

**Automobiles and Other Vehicles § 94.7— intoxicated driver—contributory negligence by deceased passenger—summary judgment improper**

Summary judgment should not have been granted for defendant in an action arising from an automobile accident where the evidence manifestly showed that defendant's negligence was a proximate cause of plaintiff's decedent's death; plaintiff's evidence showed that her decedent and another passenger entered a vehicle owned and operated by defendant and shortly thereafter picked up a third passenger; the four purchased beer and placed it in a cooler in the vehicle; defendant drove around Lee County while all four consumed beer; the last passenger was taken home; the three continued driving around until the accident occurred; and there were conflicts in the evidence as to whether defendant had drunk any beer prior to meeting the first two passengers and regarding the amount of beer consumed by defendant. The

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**Baker v. Mauldin**

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issue of defendant's gross negligence should also have been left to the jury because there was evidence that immediately prior to the accident defendant was driving 100 miles per hour.

APPEAL by plaintiff from *Lupton, Judge*. Judgment entered 6 December 1985 in Superior Court, LEE County. Heard in the Court of Appeals 12 June 1986.

The subject of this action was the subject of a prior action brought by plaintiff against defendant (84CVS559, complaint filed 18 June 1984). On 27 September 1984, plaintiff gave notice of voluntary dismissal without prejudice pursuant to Rule 41(a), N.C. Rules Civ. P. Plaintiff filed this action on 17 September 1985, wherein plaintiff alleged grounds for two causes of action, to wit: negligence (Claim I) and gross negligence (Claim II). Plaintiff alleged the following: that plaintiff is the administratrix of the estate of the deceased James Reginald Hickman; that defendant owned a 1967 Pontiac automobile; that on or about 24 April 1983, while defendant was operating the vehicle in an easterly direction on a rural paved road in Harnett County, the vehicle left the road and crashed; that James Reginald Hickman, a passenger in the rear seat of the vehicle, was killed as a result of the accident; and that the death of plaintiff's decedent was proximately caused by the negligence of defendant, who (1) drove at an excessive speed for the existing conditions, (2) failed to keep the vehicle under control, and (3) failed to drive on the right side of the highway; that defendant's conduct was "wanton and willful" in that defendant drove the vehicle upon the public highway carelessly and heedlessly, "at a dangerously excessive speed on a curvy, rural road at night," while defendant's "mental and physical faculties were impaired by the consumption of beer" in violation of G.S. 20-138.1. Plaintiff sought \$100,000.00 in damages plus interest and costs.

On 19 September 1985, defendant answered, admitting that he operated the vehicle while his mental and physical faculties were impaired by the consumption of beer, denying all other substantive allegations and alleging the contributory negligence of plaintiff's decedent. Defendant alleged that plaintiff's decedent voluntarily rode in the vehicle at a time when he knew or should have known that defendant's actions were negligent and that

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**Baker v. Mauldin**

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plaintiff's decedent failed to request him to stop, thereby acquiescing to defendant's manner of operating the vehicle.

On 17 October 1985, defendant filed a motion for summary judgment. On 1 December 1985 plaintiff filed a memorandum of law in opposition to defendant's motion. After considering the deposition of Dennis Vick, a second passenger in the vehicle at the time of the accident, the deposition of defendant, and the affidavit of Dennis Vick, the court granted summary judgment in favor of defendant. Plaintiff appeals.

*Moretz & Silverman, by J. Douglas Moretz and Jonathan Silverman, for plaintiff appellant.*

*Staton, Perkinson, West, Doster & Post, by Stanley W. West, for defendant appellee.*

JOHNSON, Judge.

The sole issue on appeal is whether the court erred in granting summary judgment in favor of defendant. We hold that under the circumstances of this case summary judgment was improvidently granted.

Plaintiff positively alleged in her complaint that defendant was mentally and physically impaired by the consumption of beer in violation of G.S. 20-138.1. Defendant admitted the truth of this allegation in his answer. Defendant is bound by his pleadings. *Universal C.I.T. Credit Corp. v. Saunders*, 235 N.C. 369, 70 S.E. 2d 176 (1952). Hence, plaintiff's allegation is conclusive. It is negligence *per se* to operate a vehicle while impaired within the meaning of G.S. 20-138.1. *King v. Allred*, 309 N.C. 113, 116, 305 S.E. 2d 554, 556 (1983); *Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E. 2d 33, 34-35 (1964) (with reference to now repealed G.S. 20-138).

The evidence manifestly shows that defendant's negligence was a proximate cause of plaintiff's decedent's death. Hence, the threshold issue is whether the actions of the deceased James Reginald Hickman constitute negligence which proximately contributed to his injuries and death as a matter of law, thereby barring recovery by his administratrix for his death. *Southern Nat'l Bank of N.C. v. Lindsey*, 264 N.C. 585, 588, 142 S.E. 2d 357, 360 (1965). When the defendant establishes a complete defense to the plaintiff's claim, he is entitled to the quick and final disposition of

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**Baker v. Mauldin**

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that claim which summary judgment provides. *Ballinger v. Secretary of the N.C. Dept. of Revenue*, 59 N.C. App. 508, 512, 296 S.E. 2d 836, 839 (1982), *cert. denied*, 307 N.C. 576, 299 S.E. 2d 645 (1983). The party moving for summary judgment has the burden of establishing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Long v. Long*, 15 N.C. App. 525, 190 S.E. 2d 415 (1972). All inferences of fact must be drawn against the movant and in favor of the party opposing the motion. *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E. 2d 189, 194 (1972).

It is well established that if one enters an automobile with knowledge that the driver is impaired and voluntarily rides with him, he is guilty of contributory negligence *per se*. *Davis v. Rigsby, supra*, at 686-87, 136 S.E. 2d at 35. Further, when a gratuitous passenger becomes aware that the driver is driving the vehicle in which he is riding in a reckless and dangerous manner, the duty devolves upon him in the exercise of due care for his own safety to caution the driver and, if the warning is disregarded, to request him to stop so that the passenger may be permitted to leave the vehicle. *Beam v. Parham*, 263 N.C. 417, 420, 139 S.E. 2d 712, 714 (1965). Where conflicting inferences may be drawn from the evidence, it is for the jury to decide whether the failure of the passenger to take affirmative action for his own safety should constitute contributory negligence. *Id.* at 420-21, 139 S.E. 2d at 714. The question of contributory negligence on the part of the plaintiff's decedent is also properly left to the jury when there is some evidence of willful and wanton conduct by the defendant. *Jackson v. Jackson*, 4 N.C. App. 153, 156, 166 S.E. 2d 541, 543 (1969).

Plaintiff's evidence shows that on or about the evening of 28 April 1983 at approximately 7:00 p.m. James Reginald Hickman and Dennis Vick entered a vehicle owned and operated by defendant. Shortly thereafter they went to the home of Alicia Ward and picked her up. The four purchased beer and placed it in a cooler in the vehicle. Defendant drove them around Lee County while all four consumed beer. Between 8:00 and 9:30 p.m. defendant took Alicia Ward home. The threesome continued driving around until the accident occurred at approximately 1:30 a.m. There is a conflict in the testimonies of defendant and Vick as to whether defendant had drunk any beer prior to meeting Hickman and Vick.

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**Baker v. Mauldin**

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There is also a conflict in the evidence regarding the amount of beer consumed by defendant. Vick testified at his deposition that they purchased two cases of beer and that defendant drank fifteen or sixteen beers during the period from 6:00 p.m. until 1:00 a.m. Vick's later affidavit stated that they purchased "a couple of six packs of beer." Defendant testified that he drank anywhere from four to seven beers that evening and none after returning Alicia Ward to her home. Although defendant testified that James Reginald Hickman handed defendant each beer that he drank, he also testified that Hickman was "dozing off" in the rear seat. Vick testified at his deposition and alleged in his affidavit that defendant's driving was "normal" and that defendant "did [nothing] that made me think that his driving was affected by any beer that he may have drunk." Resolving all inferences from the above evidence in favor of plaintiff, we cannot find contributory negligence as a matter of law. When conflicting inferences may be drawn regarding whether defendant was intoxicated when Hickman entered the vehicle and whether defendant's driving or level of alcohol consumption was such as to impose upon Hickman an affirmative duty to take action to protect his safety, these questions are for the jury. See *Jackson v. Jackson*, *supra*, at 156, 166 S.E. 2d at 542. The jury should decide, *inter alia*, whether, under the circumstances, an ordinarily prudent person would have asked to get out of a vehicle on a rural road late at night rather than risk a ride with defendant. *Beam v. Parham*, *supra*, at 421, 139 S.E. 2d at 715.

Moreover, although there is some evidence that defendant was not driving as though intoxicated, there is also evidence that immediately prior to the accident defendant was driving 100 miles per hour. This is some evidence to support plaintiff's allegation that defendant's conduct was willful and wanton. Accordingly, the issue of defendant's gross negligence should also be left to the jury. *Jackson v. Jackson*, *supra*, at 156, 166 S.E. 2d at 543. Ordinarily, contributory negligence on the part of a plaintiff's decedent does not bar recovery when the willful and wanton conduct of a defendant is a proximate cause of the plaintiff's decedent's injuries. See *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E. 2d 345, 350 (1971).

Summary judgment for defendant is



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**King v. N.C. State Bd. of Sanitarian Examiners**

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Reversed.

Judges BECTON and COZORT concur.

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S. BERT KING, JAMES WISELY v. NORTH CAROLINA STATE BOARD OF  
SANITARIAN EXAMINERS

No. 8510SC1113

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JAMES P. ADAMS, WILLIAM McQUEEN v. NORTH CAROLINA STATE  
BOARD OF SANITARIAN EXAMINERS

No. 8510SC1114

(Filed 5 August 1986)

**1. Health § 1—sanitarians—registration improperly denied**

The superior court correctly ruled that the State Board of Sanitarian Examiners' denial of petitioners' requests for certification as registered sanitarians was affected by an error of law where the Board's denial was based on a finding that petitioners were not engaged in a broad range of environmental health functions indicative of a sanitarian on 1 October 1982, the effective date of a grandfather clause for sanitarian registration, and N.C.G.S. § 90A-51(4) does not require that one be engaged in a broad range of environmental health functions. N.C.G.S. § 90-61(a).

**2. Administrative Law § 8—reversal and remand of board decision—proper**

The superior court did not err by both reversing and remanding decisions of the State Board of Sanitarian Examiners to deny petitioners certification as registered sanitarians where reversal was proper because the Board's decisions were affected by an error of law and remand was necessary so that the Board could make its decisions in accordance with the correct legal standard. N.C.G.S. § 150A-51(4).

APPEALS by respondent appellants from *Read, Judge*. Judgments entered 18 September 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 13 February 1986.

*Attorney General Lacy H. Thornburg by Assistant Attorneys General Robert R. Reilly and Sarah C. Young for respondent appellant.*

*Patrice Solberg for petitioner appellees.*

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King v. N.C. State Bd. of Sanitarian Examiners

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COZORT, Judge.

Pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure, we consolidate these two cases on appeal because they involve common questions of law.

Respondent, North Carolina State Board of Sanitarian Examiners, appeals the superior court's reversal and remand of its decisions denying petitioners certification as registered sanitarians. We affirm.

All petitioners applied for certification as registered sanitarians under G.S. 90A-61(a). Petitioner King was employed as a water treatment plant consultant with the North Carolina Department of Human Resources, Division of Health Services, Local Services Section. Petitioner Wisely was employed as an Environmental Engineering Technician II with the Department of Human Resources, Division of Health Services, Environmental Health Section, Water Supply Branch. Petitioners Adams and McQueen were employed as Environmental Engineers I with the Department of Human Resources, Division of Health Services, Environmental Health Section, Water Supply Branch. After hearings before the North Carolina State Board of Sanitarian Examiners (hereinafter the "Board") all petitioners were denied certification as registered sanitarians.

Pursuant to G.S. 150A-45 petitioners sought judicial review of the Board's decisions denying them certification as registered sanitarians. The matter came on for hearing in superior court, and the court reversed and remanded the Board's decisions because the Board had acted under a misapprehension of the law when it denied petitioners certification as registered sanitarians on the ground that "petitioners were not engaged in the broad range of environmental health functions, indicative of a sanitarian, on October 1, 1982." The Board then appealed to this Court.

By its assignments of error, the Board contends that the superior court (1) misconstrued a certain finding of fact in the Board's decisions, and (2) exceeded its scope of review pursuant to G.S. 150A-51 in both reversing and remanding the Board's decisions.

[1] G.S. Chapter 90A, Article 4, entitled "Registrations [sic] of Sanitarians" (G.S. 90A-50, *et seq.*) was rewritten effective 1 Oc-

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**King v. N.C. State Bd. of Sanitarian Examiners**

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tober 1982 and requires mandatory registration for sanitarians. Sanitarian is defined by G.S. 90A-51(4):

"Sanitarian" is a public health professional qualified by education in the arts and sciences, specialized training, and acceptable environmental health field experience to effectively plan, organize, manage, execute and evaluate one or more of the many diverse elements comprising the field of environmental health.

G.S. 90A-61(a) contains a grandfather clause which provides that "[a]ny person who submits to the Board under oath evidence that such person was practicing as a sanitarian (as defined in G.S. 90A-51(4) of this Article) . . . in the State of North Carolina on October 1, 1982, shall be certified as a registered sanitarian."

In denying the petitioners certification as registered sanitarians the Board found, in finding of fact B5, of each decision, that "[t]he petitioners were not engaged in the broad range of environmental health functions, indicative of a sanitarian, on October 1, 1982." In reversing the Board and remanding the actions to the Board, the superior court ruled in each case "[t]hat based on a review of the record, the briefs filed in this matter and arguments of counsel, the Court determines that the Board denied the petitioners licensure on the basis that they were not engaged in the 'broad range' of environmental health functions." The court further ruled "[t]hat North Carolina law does not require applicants for certification as a sanitarian to be engaged in a 'broad range' of environmental health functions," and "the Board was without authority to require applicants to be engaged in a 'broad range' of environmental health functions." The Board excepts to these rulings.

In Adams' and McQueen's cases the Board argues that,

the Findings of Fact clearly established that the petitioners were denied certification as registered sanitarians under the grandfather provisions of G.S. 90A-61(a) because they were practicing as environmental engineers on October 1, 1982. The Superior Court's determination that the petitioners were denied licensure because they "were not engaged in the 'broad range' of environmental health functions" . . . misconstrues Finding of Fact B5 and ignores the import of

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**King v. N.C. State Bd. of Sanitarian Examiners**

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the other Findings of Fact. The basis of the Board's decision was the Findings of Facts that petitioners "were engaged in the practice of environmental engineering" and that the job specifications and descriptions "accurately reflect(ed) the essential engineering functions of the work performed by the petitioners."

In King's and Wisely's case the Board argues that

the Findings of Fact clearly established that the petitioners were denied certification as registered sanitarians under the grandfather provisions of G.S. 90A-61(a) because they were practicing as assistants to environmental engineers on October 1, 1982. The Superior Court's determination that the petitioners were denied licensure because they "were not engaged in the 'broad range' of environmental health functions" . . . misconstrues Finding of Fact B5 and ignores the import of the other Findings of Fact. The basis of the Board's decision was the Findings of Facts that petitioners "were functioning as assistants to and were supervised by environmental engineers" and that the job specifications and descriptions "accurately reflect(ed) the essential engineering (or water treatment plant consultant) functions of the work performed by the petitioners."

We disagree with the Board and agree with the superior court that the Board's decision to deny petitioners certification as registered sanitarians was based on its findings that "petitioners were not engaged in the broad range of environmental health functions, indicative of a sanitarian, on October 1, 1982" and as such its decision was affected by an error of law.

G.S. 90A-51(4) does not require that a person be engaged in a "broad range of environmental health functions." Rather, the statute plainly requires that in order to be certified as a registered sanitarian one must be "a public health professional qualified . . . to effectively plan, organize, manage, execute and evaluate *one or more* of the many diverse elements comprising the field of environmental health." (Emphasis added.) We affirm the superior court's rulings that the Board's denial of petitioners' request for certification as registered sanitarians was based on its finding of fact B5; that G.S. 90A-51(4) does not require that one be engaged

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**King v. N.C. State Bd. of Sanitarian Examiners**

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in a broad range of environmental health functions; and, that the Board's decisions were affected by an error of law.

[2] Next the Board contends that the superior court erred in both reversing and remanding the Board's decisions. We find this argument to be erroneous.

G.S. 150A-51 sets out the superior court's scope of review of the Board's decisions. In conducting this review G.S. 150A-51 allows the superior court to affirm the Board's decision or remand the case for further proceedings. This power is not defined. *Harrell v. Wilson County Schools*, 58 N.C. App. 260, 293 S.E. 2d 687 (1982). Under G.S. 150A-51 the power to reverse the Board's decision is defined. A reversal is allowed if substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are affected by an error of law. G.S. 150A-51(4).

Here the court determined that the substantial rights of the petitioners had been prejudiced because the agency's decisions were affected by an error of law. The court reversed the Board's decisions denying petitioners certification as registered sanitarians and remanded the case to the Board "for further proceedings not inconsistent with this ruling and the laws of the State of North Carolina." The Board's finding that "petitioners were not engaged in the broad range of environmental health functions" did not justify its conclusion that the petitioners were not practicing as sanitarians and its decisions to deny petitioners certification as registered sanitarians. A reversal was proper in this case because the Board's decisions to deny petitioners certification as registered sanitarians because they "were not engaged in the broad range of environmental health functions" was affected by an error of law. A remand is necessary so that the Board can make its decisions in accordance with the correct legal standard.

Affirmed.

Judges WELLS and WHICHARD concur.

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IN re Appeal of Medical Center

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IN RE: APPEAL OF MEDICAL CENTER (BOWMAN GRAY SCHOOL OF MEDICINE OF WAKE FOREST UNIVERSITY AND NORTH CAROLINA BAPTIST HOSPITALS, INC.) FROM DECISION OF THE COMMISSIONER OF INSURANCE, NORTH CAROLINA DEPARTMENT OF INSURANCE

No. 8521SC1065

(Filed 5 August 1986)

**Statutes § 5.5— interpretation of State building code by Insurance Commissioner—  
erroneous**

The superior court correctly ruled that the Insurance Commissioner's decision to require a proposed high-rise building to be provided with emergency generator power for fans that vent smoke in areas of the building in addition to elevator shafts, stairways, and areas of refuge was affected by an error of law where the plain language of Section 506.13(a)(1) of the North Carolina State Building Code limits the requirement of an emergency power supply to the fans that serve for pressurization, smoke venting or smoke control for elevator shafts, stairways, and areas of refuge. While the building code is to be liberally construed, its plain language cannot be ignored.

APPEAL by respondent James E. Long, Commissioner of Insurance, from *Washington, Judge*. Judgment entered 27 August 1985 in Superior Court, FORSYTH County. Heard in the Court of Appeals 6 February 1986.

*Attorney General Lacy H. Thornburg by Special Deputy Attorney General Isham B. Hudson, Jr., for the State.*

*Womble, Carlyle, Sandridge & Rice by Roddey M. Ligon, Jr., and Anthony H. Brett for petitioner Medical Center.*

COZORT, Judge.

The Commissioner of Insurance ruled that Section 506.13(a)(1) of the North Carolina State Building Code requires the Medical Center's proposed Class III high-rise building to be provided with emergency generator power for fans that vent smoke in some areas of the building in addition to elevator shafts, stairways, and areas of refuge. His decision was reversed by the superior court, which held the Building Code does not require emergency power for vent fans in the additional areas. We affirm the superior court.

In late 1984 the Medical Center, consisting of Bowman Gray School of Medicine of Wake Forest University and North Carolina

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**In re Appeal of Medical Center**

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Baptist Hospitals, Inc., located in Winston-Salem, North Carolina, submitted to the Engineering Division of the North Carolina Department of Insurance (hereinafter "Department") design development documents and final construction documents for a new inpatient tower. The submission was made pursuant to the North Carolina State Building Code, hereinafter "Building Code."

The tower (defined under the Building Code as a Class III high-rise building) will be equipped with sprinklers and will contain windows that cannot be opened to vent products of combustion and smoke in the event of fire. Documents submitted by the Medical Center show that emergency electrical power would not be provided for the air handling equipment designed for venting the building, other than in elevator shafts, stairways, and areas of refuge.

During review of the final construction documents, the Department informed the Medical Center's architects and engineers that the Department's interpretation of Section 506.13 of Volume 1 of the Building Code required that air handling equipment designed for smoke removal in some areas other than elevator shafts, stairways, and refuge areas was to be provided with emergency power.

After an unsuccessful attempt to get the Department to alter its position, the Medical Center requested a hearing pursuant to G.S. 143-140 before the Commissioner of Insurance on the Department's interpretation of Section 506.13 of Volume 1 of the Building Code. On 27 June 1985 the Commissioner ruled that the Building Code required emergency power for the air handling equipment (fans) in question. On 3 July 1985, pursuant to G.S. 143-141, the Medical Center sought judicial review of this decision in superior court. On 27 August 1985 the Commissioner's decision was reversed by the Honorable Edward K. Washington. On 30 August 1985, the Commissioner appealed to this Court Judge Washington's order.

The issue before the Commissioner, the superior court, and this Court is whether the Building Code requires the Medical Center's proposed inpatient tower to be provided with emergency power for fans that vent smoke in those parts of the building not consisting of elevator shafts, stairways, and areas of refuge. The resolution of this issue turns upon the interpretation of Sec-

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In re Appeal of Medical Center

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tion 506.13(a)(1) of Volume 1 of the Building Code. That section provides:

**506.13—EMERGENCY ELECTRICAL POWER SUPPLY.**

(a) Emergency Generator Capacity—Class I, II and III buildings shall be provided with an approved emergency generator power supply, located in a 2 hour fire rated enclosure, properly ventilated to the outside. The emergency generator power supply shall be capable of operating under a full load for at least 2 hours and shall be automatically switched over in the event of failure of the normal source of power supply or manually operational for emergency power supply for:

(1) Pressurization Fans—Fans to provide required pressurization, smoke venting or smoke control for elevator shafts and stairways and areas of refuge in 506.3(c), 506.7(b) and 506.18(d). (Emphasis added.)

Commissioner Long, in interpreting the underlined language of Section 506.13(a)(1), concluded that,

[t]he Department has routinely interpreted the N. C. Building Code to insure the maximum life safety. Proper life safety is accomplished in high rise structures by providing (1) pressurization of some areas, (2) venting of products of combustion from the fire floor, and (3) preventing smoke contamination in areas such as elevators and stairs used for exit purposes and for designated areas of refuge.

The Commissioner further concluded that,

[i]n order to accomplish these purposes, Section 506.13(a)(1) must be interpreted to mean that the three types of fans required to be served by emergency power are the following:

(1) Those that provide “required pressurization.” This is not limited to pressurization for elevator shafts, stairways, and areas of refuge, but applies to any other area of the building requiring pressurization.

(2) Those that provide for venting smoke. When taken together with Section 506.5, plain language and common



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In re Appeal of Medical Center

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sense dictate that emergency power cannot be limited to just those fans that serve elevator shafts, stairways, and areas of refuge, but must also serve other parts of the building occupied by patients and employees.

(3) Those that provide smoke control (by pressurization) in elevator shafts, stairways, and areas of refuge—areas where venting by exhausting smoke is not appropriate or specified.

The superior court ruled that the Commissioner's decision was affected by an error of law and reversed the Commissioner. The superior court found the "plain language" rule of statutory construction to be applicable in construing the meaning of Section 506.13(a)(1). It determined "that the plain language of this Section limits the requirement of an emergency power supply to the fans that serve for pressurization, smoke venting or smoke control for elevator shafts and stairways and areas of refuge." The superior court noted that the Commissioner "contends that the Court should defer to the interpretation of the Code made by the officials of the Department of Insurance since that is the Department charged with the enforcement of the Code." The superior court noted, however, "that a desire to defer to the interpretation of the Insurance Department does not permit the Court to ignore the plain language of the Code. It is the duty of the administrative agency to apply the Code as it is written, and likewise the responsibility of the Court to apply the Code as it is written." We agree with the superior court's reasoning and its "plain language" interpretation of Section 506.13(a)(1).

As we stated in *State v. Felts*, 79 N.C. App. 205, 208-09, 339 S.E. 2d 99, 101, *disc. review denied*, 316 N.C. 555, 344 S.E. 2d 11 (1986):

In construing a statute, its "words are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise." *State v. Wiggins*, 272 N.C. 147, 153, 158 S.E. 2d 37, 42 (1967), *cert. denied*, 390 U.S. 1028, 20 L.Ed. 2d 285, 88 S.Ct. 1418 (1968). When a statute's language is clear and unambiguous, it must be given effect, and its clear meaning may not be evaded by the courts under the guise of construction. *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 465, 232 S.E. 2d 184, 192 (1977).

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In re Appeal of Medical Center

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The clear language of Section 506.13(a)(1) requires "emergency generator power supply" only for fans which "provide required pressurization, smoke venting or smoke control for elevator shafts and stairways and areas of refuge in 506.3(c), 506.7(b) and 506.18(d)." Section 506.13(a)(1) simply does not require emergency power fans that vent smoke in other parts of the building. While the Building Code is to be liberally construed in order to accomplish its purpose, G.S. 143-138(c), we cannot ignore the plain language of Section 506.13(a)(1). It might be true, as the Commissioner concluded, that "[p]roper life safety is accomplished in high rise structures by providing (1) pressurization of some areas, (2) venting of products of combustion from the fire floor, and (3) preventing smoke contamination in areas such as elevators and stairs used for exit purposes and for designated areas of refuge." The Building Code Council, however, did not require emergency power for fans to vent smoke other than those fans for providing "required pressurization, smoke venting or smoke control for elevator shafts and stairways and areas of refuge in 506.3(c), 506.7(b) and 506.18(d)." Section 506.13(a)(1). We agree with the superior court "that if the Building Code Council had intended to make the emergency power requirement applicable to fans providing smoke venting or smoke control throughout the building, the Council would have used language other than language specifying that the requirement applies only to stairways, elevator shafts and areas of refuge." We cannot interpret the Building Code to require more than is provided in its plain language.

Affirmed.

Judges WELLS and WHICHARD concur.

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State ex rel. Crews v. Parker

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THE STATE OF NORTH CAROLINA BY AND THROUGH THE PENDER COUNTY CHILD SUPPORT ENFORCEMENT AGENCY, *EX REL.* ALENE LEWIS CREWS, APPELLEE, ALENE LEWIS CREWS, INTERVENOR-APPELLANT v. FREDDIE PARKER, AKA FREDERICK EDGE PARKER, JR., APPELLEE

No. 865DC158

(Filed 5 August 1986)

**Social Security and Public Welfare § 2— acceptance of public assistance—all rights to child support assigned to State**

The trial court properly denied a motion to intervene to seek retroactive child support filed by the child's grandmother, with whom the child had lived since shortly after her birth, where the Pender County Child Support Enforcement Agency and the child's father had entered into a proposed settlement which included public assistance arrearages and the grandmother had accepted AFDC benefits on behalf of the minor child. By accepting public assistance, the recipient assigned all rights to support owed for the child to the State, including claims which had accrued when the assignment was made. N.C.G.S. § 110-137, N.C.G.S. § 1A-1, Rule 24(a)(2).

APPEAL by intervenor from *Morris-Goodson, Judge*. Order entered 12 December 1985 in District Court, PENDER County. Heard in the Court of Appeals 6 June 1986.

The State of North Carolina, through its Child Support Enforcement Agency in Pender County, brought this action against the defendant, Freddie Parker, by filing a civil complaint on 6 February 1985. Plaintiff, pursuant to Article 9 of Chapter 110 and Article 3 of Chapter 49 of the North Carolina General Statutes, sought: (1) an adjudication that defendant is the father of Cheryl Michele Crews; (2) an order requiring defendant to provide support and maintenance for said child; and (3) an order requiring defendant to reimburse the State for all past public assistance provided for the minor child.

The minor child was born 5 April 1968. Since shortly after her birth she has resided with her grandmother, Alene Lewis Crews. Neither the child's mother nor father have provided support for her. In late 1981, after the death of her husband, Alene Crews made application for and received public assistance, through the Aid for Dependent Children (AFDC) program, on behalf of the minor child.

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*State ex rel. Crews v. Parker*

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Plaintiff and defendant Parker entered into a proposed settlement and presented a consent order to the District Court for approval. The proposed order provided for defendant Parker to acknowledge paternity of Cheryl Crews, pay \$125.00 per month for her support, and pay \$900.00 in settlement of public assistance arrearages. The actual arrearages were calculated at \$2,265.40 as of 1 July 1985.

Alene Lewis Crews filed a motion to be permitted to intervene in the action. In her accompanying complaint, she alleged that plaintiff had failed to assist her in obtaining retroactive child support from defendant Parker, and she requested that plaintiff be enjoined from entering into any settlement with Parker which did not take into account her claim for retroactive support. She requested further that plaintiff be required to assist her in recovering retroactive support from Parker.

The trial court denied the motion to intervene, finding and concluding that under applicable federal and state laws Alene Crews had assigned to the North Carolina Department of Human Resources all rights which she may have had to child support owed for the minor child by defendant. Alene Crews appeals.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Clifton H. Duke, for the State.*

*Legal Services of the Lower Cape Fear, by Curtis Brian Venable and Mason Hogan, for intervenor appellant.*

*Harold L. Pollock for plaintiff appellee.*

MARTIN, Judge.

Assigning error to the denial of her motion to intervene, appellant contends that she is entitled to intervene as a matter of right pursuant to G.S. 1A-1, Rule 24(a)(2) because she has an interest in the subject matter of the action between plaintiff and Freddie Parker. Thus, the sole question on appeal is whether appellant, by accepting AFDC benefits, assigned her interest in the subject matter of the suit, i.e., her claim against Parker for child support, to the State. For the reasons which follow, we affirm the order of the trial court.

In order to be eligible for AFDC, federal regulations require the recipient

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State ex rel. Crews v. Parker

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to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed.

42 U.S.C. § 602(a)(26)(A). "Reading of the plain language of the statute shows that it refers to '*rights* . . . which have accrued,' not to actual support moneys owed at the time of assignment (emphasis supplied)." *Matter of Stovall*, 721 F. 2d 1133, 1135 (7th Cir. 1983).

Congress intended the total support obligation to be assigned to the states. Section 602(a)(26) was designed to 'require that a mother, as a condition of eligibility for welfare, assign her right to support payments to the State and cooperate in . . . obtaining any money or property due the family . . . .' In addition, 'the assignment of support rights will continue as long as the family continues to receive assistance.' S.REP No. 93-1356, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADM. NEWS 8133, 8152-53. This continuing right covers both arrearages accrued at the time of assignment and support payments which become due after the assignment.

*Id.*

The federal regulations provide that "[t]he support rights assigned to the State under section 602(a)(26) . . . constitute an obligation owed to such State by the individual responsible for providing such support." 42 U.S.C. § 656(a)(1). The obligation owed is either an "amount specified in a court order which covers the assigned support rights," or where there is no previous court order, "an amount determined by the State." 42 U.S.C. § 656(a)(2)(A) and (B). The State is under an obligation to establish paternity of the child and to secure support for the child. 42 U.S.C. § 654(4). The State is also required to collect any child support monies and offset them against the amounts paid out in public assistance. 42 U.S.C § 657(b)(1)-(4). Upon termination of the assistance, the State may, for a limited time, collect the obligor's support payments and, to a limited extent, retain payments to reimburse it for public assistance arrearages. 42 U.S.C § 657(c).

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**State ex rel. Crews v. Parker**

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The Social Security Regulations require that the State utilize an assignment "substantially identical" to that required by Section 602(a)(26). 45 C.F.R. § 232.11(b). North Carolina provides in G.S. 110-137 the following:

By accepting public assistance for or on behalf of a dependent child or children, the recipient shall be deemed to have made an assignment to the State or to the county from which such assistance was received of the right to any child support owed for the child or children up to the amount of public assistance paid. The State or county shall be subrogated to the right of the child or children or the person having custody to initiate a support action under this Article and to recover any payments ordered by the court of this or any other state.

The payment of public assistance creates a debt owing to the State by the responsible parent. G.S. 110-135. The county has the authority and duty to institute paternity proceedings against putative fathers; to bring an action against the putative father for the maintenance of the child; and to recover amounts paid by the county in support of the child. G.S. 110-128, -135, -138, and -139; *Settle ex rel. Sullivan v. Beasley*, 309 N.C. 616, 308 S.E. 2d 288 (1983); *Carrington v. Townes*, 53 N.C. App. 649, 281 S.E. 2d 765 (1981), modified, 306 N.C. 333, 293 S.E. 2d 95 (1982), U.S. *cert. denied*, 459 U.S. 1113, 74 L.Ed. 2d 965, 103 S.Ct. 745 (1983). In these proceedings, the county is the real party in interest. *Settle ex rel. Sullivan; Carrington*. Article 9 of Chapter 110 also provides that "[n]othing in this Article is intended to conflict with any provision of federal law or to result in the loss of federal funds." G.S. 110-140.

We hold that, based on federal and State law, by accepting public assistance, the recipient assigns *all* rights to support owed for the child to the State, including claims which had accrued when the assignment was made. Once public assistance payments terminate, any rights to support assigned to the State revert back to the recipient. Therefore, we conclude that the trial court properly denied appellant's motion to intervene to seek retroactive child support.

Affirmed.

Judges PHILLIPS and PARKER concur.

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**Swindell v. Lewis**

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MARJORIE M. SWINDELL v. WILLIAM H. LEWIS, JR., ET ALs

No. 852DC1251

(Filed 5 August 1986)

**1. Divorce and Alimony § 30— equitable distribution—separation in 1972 and divorce in 1983— appreciation of real property**

The trial court in a divorce and equitable distribution action did not err by awarding plaintiff a one-half undivided interest in real property which had a value of \$316,193 in 1972, the year of separation, and a value of \$913,889 in 1983, the year absolute divorce was granted. The result in this case would be the same whenever the property was valued because plaintiff would be entitled to 50% of the marital property at separation plus 50% of any appreciation after separation because defendants did not show that the property's appreciation was due to the deceased husband's contributions. N.C.G.S. § 50-21(b).

**2. Divorce and Alimony § 30— equitable distribution—defendant died while action pending—heirs properly joined**

The trial court did not err by ordering joinder of Melvin Swindell's heirs at law as necessary parties where an action for divorce and equitable distribution was brought while Melvin was alive and the administrator of his estate was substituted as a party after his death because title to his real property vested in his heirs at his death. N.C.G.S. § 28A-15-2(b) (1984).

APPEAL by defendants from *Ward, Judge*. Judgment entered 26 June 1985 *nunc pro tunc* 10 February 1983 in HYDE County District Court. Appeal by plaintiff from *Ward, Judge*. Judgment entered 29 June 1985 in HYDE County District Court. Heard in the Court of Appeals 6 May 1986.

Plaintiff wife filed this action seeking absolute divorce and equitable distribution. Summons was issued on 6 October 1981. Absolute divorce was granted on the ground of one year separation on 5 January 1983. On 12 February 1983 the court appointed an appraiser to determine the value of the real property at issue. On 27 June 1984 an order was entered finding that the defendant Melvin Swindell had died intestate and ordering that the administrator of defendant's estate, R. W. Hutchins, be substituted as defendant and that certain claimed heirs-at-law be added as parties defendant. On 1 November 1984 plaintiff filed a motion to rescind the order joining additional parties. On 9 January 1985 the court ordered that William H. Lewis, Jr. be substituted for R. W. Hutchins as administrator of the estate.

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**Swindell v. Lewis**

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After five hearings on the equitable distribution issue the trial court concluded that an equal division of the marital real properties was equitable. The court ordered on 26 June 1985 *nunc pro tunc* 10 February 1983 that those tracts found to be marital property were to be divided in kind; one-half undivided interest in each tract to plaintiff and one-half undivided interest to the decedent Melvin Swindell, as tenants in common, and ordered that reciprocal deeds be executed to effect transfer of title. Defendants William Lewis, Gloria Lowe, Roger Swindell and Bonnie Selby appealed.

On 29 June 1985 the trial court entered an order denying plaintiff's motion to rescind the order joining additional parties. Plaintiff appealed.

*Maupin Taylor Ellis & Adams, P.A., by R. Stephen Camp, Steven M. Rudisill and Holmes P. Harden, for plaintiff.*

*Everett, Everett, Warren & Harper, by Edward J. Harper, II, and Lewis, Lewis, Burti & Cummings, by Howard J. Cummings, for defendant William Lewis.*

*Carter, Archie & Hassell, by Sidney J. Hassell, Jr., for defendant Gloria Lowe.*

*Hall, Hill, O'Donnell, Taylor & Manning, by Raymond M. Taylor, for defendants Gene Swindell and Sybil Swindell.*

*J. Michael Weeks, P.A., by J. Michael Weeks, for defendant Roger Swindell.*

*Davis & Davis, by George Thomas Davis, Jr., for defendant Bonnie Selby.*

WELLS, Judge.

Defendant's Appeal

[1] In its judgment of 26 June 1985 the trial court listed appraised values of the marital real property as of 1972, the year of the couple's separation, and 1983, the year absolute divorce was granted. The cumulative value of the properties in 1972 was \$316,193.00 and in 1983 was \$913,889.00. Appellants contend that, once the property is valued as of the date of separation as mandated by N.C. Gen. Stat. § 50-21(b) (1984), plaintiff's half should be



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Swindell v. Lewis

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\$158,096.50; therefore, it was error to award her a one-half undivided interest that in 1983 had a value of \$456,944.50. In effect, appellants argue that the court's "equal division" was in fact unequal. We do not agree and affirm the trial court's judgment.

We note at the outset that the 1983 amendments which included G.S. 50-21(b) apply to this action as it was pending on 1 August 1983. *Talent v. Talent*, 76 N.C. App. 545, 334 S.E. 2d 256 (1985). The amended statute reads as follows:

If the divorce is granted on the ground of one year separation, the marital property *shall be valued* as of the date of separation . . . [Emphasis added.]

G.S. 50-21(b).

The result of this particular division would be the same whenever the property was valued. Even if we assume that the property division was made on the basis of 1983 values, that division would merely reflect the 50% of the marital property that plaintiff was entitled to at separation plus 50% of any appreciation after separation, which would be her separate property. *Dewey v. Dewey*, 77 N.C. App. 787, 336 S.E. 2d 451 (1985). This is so because defendant administrator has not shown that the properties' appreciation was due to the deceased's contributions, monetary or otherwise. *Wade v. Wade*, 72 N.C. App. 372, 325 S.E. 2d 260, *disc. rev. denied*, 313 N.C. 612, 330 S.E. 2d 616 (1985). The plaintiff thus receives the same amount of property regardless of whether the marital property was considered at its 1972 value or its 1983 value. Appellants have failed to show any prejudice from the court's actions.

Appellants contended at oral argument that this interpretation would render G.S. 50-21(b) a "dead letter." In some cases, the value of property at the time of separation will have important consequences for the award. Value of property at the time of separation is especially important when an appreciation or diminution in the value of the property has taken place since separation due to acts of a spouse's separate contributions, *see Wade, supra*; e.g., the incurring or removing of encumbrances by one spouse, *see Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E. 2d 415 (1985). In the circumstances of this case, in which determination of a later appreciated value does not change the result, the statutory pur-

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Swindell v. Lewis

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pose has not been frustrated. This assignment of error is overruled and the 26 June 1985 judgment is affirmed.

Plaintiff's Appeal

[2] Plaintiff has appealed the 29 June 1985 judgment of the trial court refusing to rescind its previous order joining the claimed heirs-at-law. When the action for divorce and equitable distribution was first brought, defendant Melvin Swindell was, of course, alive. At that time only Melvin Swindell and Marjorie Swindell had an interest in the litigation. When Melvin died, the administrator of his estate was substituted as party defendant. Plaintiff contends that joining Melvin's heirs-at-law constituted reversible error.

When a property owner dies intestate, the title to his real property vests immediately in his heirs. N.C. Gen. Stat. § 28A-15-2(b) (1984). The decedent's personal representative has the power, upon petition to the clerk of superior court, to sell decedent's real property for payments of debts and other claims against the decedent's estate, N.C. Gen. Stat. § 28A-17-1 (1984), but the proceeding is an adversary one, requiring that the heirs be made parties. N.C. Gen. Stat. § 28A-17-4 (1984); *In re Estate of Daniel*, 225 N.C. 18, 33 S.E. 2d 126 (1945). If an heir is not joined, the order of sale is void as to him. *Card v. Finch*, 142 N.C. 140, 54 S.E. 1009 (1906); *Lucas v. Felder*, 261 N.C. 169, 134 S.E. 2d 154 (1964). If this were not the case, the heir would be left without practical remedy. "He should, as a matter of common justice, have just opportunity to see that the occasion had properly arisen for resort to the land described or devised to him, and to show the contrary if he could." *Perry v. Adams*, 98 N.C. 167, 3 S.E. 729 (1887).

We believe the situation in the case at bar to be closely analogous. The title to this property, in Melvin Swindell's name, vested in the heirs at the moment of Melvin's death. The order of the court directing the deeding of a one-half undivided interest in this property to plaintiff would divest the heirs of title to this interest with the same finality as would an order to sell that interest. We hold that the heirs were necessary parties to the equitable distribution action. Accordingly, the trial court did not err in its order to join them.

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**Gunby v. Pilot Freight Carriers, Inc.**

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The judgments of 26 June 1985 and 29 June 1985 are  
Affirmed.

Judges ARNOLD and BECTON concur.

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WILLIAM W. GUNBY AND J. E. GUNBY v. PILOT FREIGHT CARRIERS, INC.,  
A NORTH CAROLINA CORPORATION

No. 8521DC1271

(Filed 5 August 1986)

**1. Assignments § 1— assignment of right to receive C.O.D. payment—valid**

There was a valid assignment of the right to receive a C.O.D. payment where there was a writing which purported to be an assignment to plaintiffs from Enclosures, Inc., of any rights, liens, interests, receivables, and holdings between Enclosures, Inc., and Pilot Freight Lines, specifically including all rights relating to a building framework shipment originating from Moreland, Georgia. N.C.G.S. § 25-1-201(36).

**2. Carriers § 11.1— C.O.D.—failure to collect—summary judgment for plaintiffs**

The trial court correctly granted summary judgment in favor of plaintiffs in an action between a shipper and a carrier for failure to collect for a C.O.D. delivery where the waybill showed that the goods were to be delivered C.O.D. and that \$11,039 was to be collected by certified check; a carrier cannot dispute the C.O.D. amount by arguing that the market value of the goods was much less than the C.O.D. amount because of defects in the goods; and a partial payment by the consignee to the shipper discharged the carrier's liability only to the extent of the partial payment.

APPEAL by defendant from *Keiger, Judge*. Judgment entered 16 August 1985 in District Court, FORSYTH County. Heard in the Court of Appeals 14 March 1986.

*Pfefferkorn, Pishko & Elliot by David C. Pishko for plaintiff appellees.*

*Bell, Davis & Pitt by Joseph T. Carruthers for defendant appellant.*

COZORT, Judge.

Plaintiffs brought this action to recover over \$10,000 in C.O.D. charges from a carrier who failed to collect the C.O.D.

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**Gunby v. Pilot Freight Carriers, Inc.**

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charges from the recipient of the merchandise. Plaintiffs claimed entitlement to the C.O.D. charges as assignee of the shipper of the merchandise. After discovery was complete, the trial court granted summary judgment for plaintiffs. Defendant appeals, alleging (1) there was no valid assignment from the shipper to plaintiffs; (2) there was no evidence of a "trip lease" agreement imposing any obligations on the defendant; (3) there was no evidence that defendant breached any duty to plaintiffs; and (4) there was a genuine issue of fact as to whether there was an accord and satisfaction reached on the amount due. We affirm the entry of summary judgment for plaintiffs.

On 12 August 1982, Enclosures, Inc., shipped building materials from Moreland, Georgia, to Kinderhook, New York, on a "collect-on-delivery" (C.O.D.) basis. Defendant, through its Transall division, delivered the building materials to Capitol Valley Contractors in Kinderhook, New York, and billed Enclosures, Inc., for the delivery of the merchandise but never collected any C.O.D. charges. Defendant's Waybill No. 426-03566 showed that the goods were to be delivered C.O.D. and \$11,039 was to be collected. The defendant did not "trip lease" the delivery to K & H Trucking as alleged by plaintiffs in their complaint. Defendant asserted several defenses to plaintiffs' claim for C.O.D. charges: (1) that the assignment from Enclosures, Inc., to plaintiffs was invalid; (2) that the merchandise delivered to Capitol Valley Contractors was defective and plaintiffs were not entitled to be paid the full \$11,039; (3) that plaintiffs have been paid in full by the consignees, Capitol Valley Contractors, for the value of the goods; and, (4) that plaintiffs owe defendant \$5,017 for unpaid shipping charges.

The defendant contends the trial court erred by granting summary judgment. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c).

[1] We first consider whether there was a valid assignment to the plaintiffs. The record contains a writing which purports to be an assignment from Enclosures, Inc., to the plaintiffs. To have a valid assignment there must be "an assignor, an assignee, and a

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**Gunby v. Pilot Freight Carriers, Inc.**

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thing assigned." *Morton v. Thornton*, 259 N.C. 697, 699, 131 S.E. 2d 378, 380 (1963); *Piedmont Cattle Credit Co. v. Hall*, 34 N.C. App. 478, 238 S.E. 2d 625 (1977). According to the written assignment, the assignor was Enclosures, Inc., by its President and Owner William Gunby; the assignee was J. E. Gunby and William W. Gunby; and the thing assigned was "all rights, liens, interest, receivables, and holdings" which exist or existed between Enclosures, Inc. and Pilot Freight Lines, specifically all rights relating to building framework sold to and shipment originating from Moreland, Georgia. The term "all rights" includes the contractual right of Enclosures, Inc., to receive its C.O.D. payment from the defendant. See G.S. 25-1-201(36). An assignee of a contractual right is a real party in interest and may maintain an action. *Morton v. Thornton*, *supra*. The authenticity of this assignment was stipulated to by the parties. As a matter of law, this was a valid assignment. The defendant's first contention is overruled.

[2] Defendant next contends that there was no evidence supporting plaintiffs' allegations of a "trip lease" agreement between defendant and K & H Trucking and no evidence establishing that defendant breached any contract or duty to Enclosures, Inc. It is immaterial whether an agreement to "trip lease" existed because the defendant's Waybill establishes the existence of an agreement between defendant and Enclosures, Inc., for the C.O.D. shipment of the building materials.

Waybill No. 426-03566 indicates the shipper as Enclosures, Inc., Moreland, Georgia, and the consignee as Capitol Valley Contractors, Kinderhook, New York. This Waybill showed that the goods were to be delivered C.O.D. and that \$11,039 was to be collected by certified check only. A C.O.D. collection fee was listed on the Waybill. A Waybill is "a document prepared by the carrier of a shipment of goods that contains details of the shipment, route and charges." *Webster's New Collegiate Dictionary*, 1334 (9th ed. 1985); accord, *Black's Law Dictionary*, 1429 (rev. 5th ed. 1979). Defendant's Waybill clearly establishes as a matter of law the existence of a written agreement where the parties agreed that delivery would be C.O.D., and the amount to be collected would be \$11,039, by certified check.

The liability of a carrier for delivering goods sent C.O.D. is set out in 27 A.L.R. 3d 1320, *et seq.*

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Gunby v. Pilot Freight Carriers, Inc.

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Under a c.o.d. shipment, the carrier acts in two capacities, as bailee to transport the goods, which is a duty imposed by law upon common carriers, and as agent to collect the price of the goods, which is not a duty imposed by law, but is a matter of private contract, express or implied, which the carrier may enter into or refuse at its option.

[W]here the carrier breaches its duty as collection agent under a c.o.d. contract, the generally applied rule is that the carrier will be liable, like any other collection agent for whatever could have been collected if the duty had been fulfilled

. . . .

*See Cermetek, Inc. v. Butler Avpak, Inc.*, 573 F. 2d 1370 (9th Cir. 1978); *Rolla Produce Co. v. American Ry. Express Co.*, 205 Mo. App. 646, 226 S.W. 582 (1920).

In *Cermetek*, the Ninth Circuit Court of Appeals thoroughly analyzed the measure of damages which arises from the breach of a C.O.D. contract. The court held that damages for breach of a C.O.D. contract is the amount the carrier was obligated to collect under the C.O.D. agreement. The court stated:

The seller generally utilizes a C.O.D. contract because he either does not trust the buyer or does not intend to advance credit. If the seller trusted the buyer he could easily enter into any number of credit transactions. . . . However, when utilizing the C.O.D. method, the seller clearly indicates he wants liquid assets, not a contract claim against a distant buyer who may be insolvent, litigious, dishonest, or all three. A buyer is not bound to accept the goods and pay the C.O.D. amount, but when he does (perhaps only because he is desperate for the goods and can get them no other way) that ends the transaction. The seller has the full value he placed on the goods. If there is any dispute as to value or defects, that is another, separate issue and the buyer must sue or take other action against the seller, as provided in the Uniform Commercial Code . . . .

*Id.* at 1379.

The carrier cannot dispute the C.O.D. amount by arguing that the market value of the goods is much less than the C.O.D. amount because of alleged defects in the goods. We hold that un-

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**Prince v. Mallard Lakes Assn.**

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der a C.O.D. contract the amount of liability incurred by a carrier, who delivers goods to the consignee without collecting the C.O.D. amount, is the C.O.D. amount, and not the value of the goods.

In this case, the consignee, Capitol Valley Contractors, rendered a partial payment to Enclosures, Inc., of \$4,150.86. Defendant argues that by accepting this payment, the plaintiff ratified defendant's failure to collect the C.O.D. charges and that defendant is relieved from its obligation to pay the charges. We disagree. As a general rule where the consignee renders a cash payment for the full C.O.D. charges to the shipper, the carrier will not be held liable for wrongful delivery. *Rolla Produce Co. v. American Ry. Exp. Co.*, *supra*, *Barnhart v. Henderson*, 147 Neb. 689, 24 N.W. 2d 854 (1947); *see Griggs v. York-Shipley, Inc.*, 229 N.C. 572, 50 S.E. 2d 914 (1948). But where the shipper receives partial payment, the carrier's liability is discharged only to the extent of the partial payment. The trial court correctly reduced the carrier's liability by the amount of payment received by the shipper from Capitol Valley Contractors. We affirm the trial court's granting of summary judgment in favor of the plaintiffs.

Affirmed.

Judges BECTON and PHILLIPS concur.

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GEORGE PRINCE, ADMINISTRATOR OF THE ESTATE OF DANIEL KEITH PRINCE,  
DECEASED v. MALLARD LAKES ASSOCIATION

No. 8521SC1340

(Filed 5 August 1986)

**Negligence § 53.5— drowning in lake—employment of lifeguard—insufficient evidence of negligence**

A subdivision association which employed a lifeguard to work at a designated swimming area of a lake was not liable for the death of a boy who drowned in the lake in the absence of evidence as to how, when or where the drowning occurred.

APPEAL by plaintiff from *Wood, Judge*. Judgment entered 6 September 1985 in Superior Court, FORSYTH County. Heard in the Court of Appeals 16 April 1986.

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Prince v. Mallard Lakes Assn.

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*Berry, Hogewood, Edwards & Freeman, P.A., by Lawrence W. Hewitt, for plaintiff appellant.*

*Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by Robert J. Lawing and G. Gray Wilson, for defendant appellee.*

BECTON, Judge.

Plaintiff, administrator of the estate of Daniel Keith Price, appeals from summary judgment entered for defendant Mallard Lakes Association in an action alleging that Prince drowned due to defendant's negligence. We affirm.

I

The evidence viewed in the light most favorable to the plaintiff reveals the following. Mallard Lakes Association (Mallard Lakes) employed Lisa Haste as a lifeguard to work from 10:00 a.m. until 5:00 p.m. at a designated swimming area in Mallard Lake. The lake was for the use of Mallard Lakes subdivision residents and their guests, and a "Mallard Lakes Residents Only" sign was posted. The swimming area was not enclosed by a fence that would restrict access to the beach.

In her written statement, Haste indicated she believed the swimming area was unsafe because it lacked a lifeguard chair, the safety equipment consisted of a cracked life ring and a first aid kit, the floating dock drifted on the lake and should have been attached by ropes to the dock, the swimming area was not enclosed by a fence, and there was debris in the lake.

Several weeks prior to the drowning, Haste told Prince, who did not live in the subdivision, that he was not supposed to be at the beach unless he was a guest of a resident. Later that day Haste told the decedent he could swim while she was there.

On the day of the drowning, Haste saw a boy whom she did not recognize arrive at the lake at 3:30 p.m. and go into the water. Haste took a head count when she left the lake at 5:00, and felt she accounted for everyone who had gone into the water. She was uncertain whether to count one of two people on a raft because she thought one swam out to the raft from some other point around the lake. Haste believed no one was at the beach when she returned at 7:00 p.m. to pick up the trash cans.



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**Prince v. Mallard Lakes Assn.**

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After Haste learned Prince was missing, she assumed the boy who had arrived at the lake at 3:30 was Prince.

## II

Summary judgment is appropriate when there is no genuine issue as to any material fact and any party is entitled to judgment as a matter of law. *Gore v. Hill*, 52 N.C. App. 620, 279 S.E. 2d 102, *disc. rev. denied*, 303 N.C. 710 (1981). The plaintiff contends summary judgment for Mallard Lakes was inappropriate because of the following genuine issues of material fact: (1) the location from which the lifeguard observed the swimmers, (2) the condition of the safety equipment, (3) the extent to which the floating dock was secured to the pier, (4) the extent to which non-residents were restricted from the swimming area, and (5) the amount of debris in the lake.

We agree that the evidence viewed in the light most favorable to the non-movant suggests discrepancies, but we find that these discrepancies are not material. Immaterial questions of fact do not preclude summary judgment. *Kessing v. Mortgage Corporation*, 278 N.C. 523, 180 S.E. 2d 823 (1971). The plaintiff has failed to produce any evidence of the basic elements of negligence: that nonperformance of a duty owed by defendants to plaintiff caused the injury. *Sasser v. Beck*, 65 N.C. App. 170, 308 S.E. 2d 722 (1983), *disc. rev. denied*, 310 N.C. 309, 312 S.E. 2d 652 (1984).

Mallard Lakes argues the decedent was a trespasser to whom the lowest duty of care was owed; the plaintiff contends he was at least a licensee, or possibly an invitee to whom the highest duty of care was owed. Assuming, without deciding, that Prince was a licensee, or even an invitee, recovery is precluded in the absence of evidence of a causal connection between the conduct of Mallard Lakes and the drowning. *See Hahn v. Perkins*, 228 N.C. 727, 46 S.E. 2d 854 (1948) (Evidence that decedent disappeared in a crowd near a pool and that his body was later found in the pool cannot produce a reasonable inference that alternative action by pool owners or employees would have saved his life.); *Sasser*, 65 N.C. App. at 171, 308 S.E. 2d at 723 ("Plaintiff offered no evidence showing he sustained his injuries by reason of some defect in the pool, that additional safety precautions would have prevented the injuries, or that their absence proximately caused the accident" when plaintiff's grandparents left plaintiff at a motel pool which

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**O'Herron v. Jerson**

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had no lifeguard and returned to find him lying at the bottom of the pool.).

Prince's body was discovered in Mallard Lake the day after his disappearance. Mallard Lake is a twenty-acre lake with numerous points of access other than the designated beach area where Haste worked. Plaintiff presents no evidence of where the drowning occurred, how it occurred, or when it occurred. The only possible evidence which would place Prince at the beach before the lifeguard went off duty at 5:00 p.m. is Haste's testimony that she saw only the back of a boy who she did not recognize in the water at 3:30 p.m. She later assumed this was Prince when authorities told her he was missing. Plaintiff in no way demonstrated how the allegedly faulty equipment, possible inattentiveness of the lifeguard, or debris in the lake contributed to the drowning, nor did he show how different safety precautions could have prevented the death. When the evidence does not reveal how, when, or where the drowning occurred, but leaves these matters to speculation, summary judgment for the defendant is appropriate. *Hahn*.

### III

For these reasons, the trial court's entry of summary judgment for Mallard Lakes is

**Affirmed.**

**Judges PHILLIPS and COZORT concur.**

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JAMES P. O'HERRON, PETITIONER, FOR THE ADOPTION OF ADAM FRANCIS  
JERSON v. JACK T. JERSON, RESPONDENT

No. 8520SC1051

(Filed 5 August 1986)

**Adoption § 2.2— findings of no abandonment—not supported by evidence**

In an action in which petitioner sought to determine that his stepson had been abandoned by his natural father and to adopt the stepson, the trial court erred by finding that the child had not been abandoned where the only competent evidence was the verified supplemental petition and the sworn testimony

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**O'Herron v. Jerson**

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of petitioner and his wife. The trial court was precluded from considering respondent's letters as affidavits because they were not verified.

APPEAL by petitioner from *Bailey (James H. Pou)*, Judge. Judgment entered 25 June 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 12 February 1986.

On 20 March 1985, James P. O'Herron, hereinafter petitioner, filed a petition for the adoption of his stepson, Adam Francis Jerson. Petitioner is married to the minor child's natural mother, Cristy Lynn O'Herron, who filed a written consent to the adoption.

In a supplemental petition, petitioner sought to determine whether the minor child had been abandoned by his natural father, Jack T. Jerson, hereinafter respondent. The supplemental petition was verified by petitioner. Respondent answered the petitions with unverified letters from himself and several others in which he denied the allegations of abandonment and refused to give consent to the adoption of his son.

The matter came on for hearing, where petitioner and his wife were present with their attorney. Respondent did not appear at the hearing. The evidence for petitioner tended to show that the child had been in the exclusive custody of petitioner and his wife since July 1983, and that respondent neither appeared in North Carolina to contest custody in prior litigation nor contacted the child from September 1983 to December 1984. Since that date, the minor child has received one post card and one telephone call from respondent. Further, that respondent had been encouraged to maintain contact with his son and had never been denied visitation with the child. Finally, both witnesses testified that no financial support had been received from respondent for the benefit of the minor child since July 1983.

After the presentation of this evidence, and after the court considered respondent's unverified letters, the court entered the following order:

This cause came on to be heard before the undersigned at the June 24 Session of the Superior Court of Wake County, having been regularly calendared for hearing and appearing on the regular printed calendar for said week.

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**O'Herron v. Jerson**

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Upon the call of the case the petitioner, James P. O'Herron, was present in court together with his attorney Donald H. Solomon and his wife, Cristy Lynn O'Herron.

The petitioner James P. O'Herron was sworn and testified. Cristy Lynn O'Herron was sworn and testified. The Court having heard the evidence, considered the pleadings, the argument of counsel finds as a fact that Adam Francis Jerson, referred to in the petition as Adam Francis O'Herron, is the natural child of Cristy Lynn O'Herron, formerly Jerson, who is presently a citizen and resident of Wichita, Kansas; that Adam Francis O'Herron was born in Columbia, South Carolina on January 31, 1975; that Jack T. Jerson and Cristy Lynn O'Herron (Jerson) were divorced on August 20, 1979; that subsequent to the divorce of the parties, the minor child, Adam Francis Jerson, remained in the custody of his father, Jack T. Jerson, until July 1, 1983; that Cristy Lynn O'Herron (Jerson) and Jack T. Jerson amicably had agreed that the child should visit Cristy Lynn O'Herron during summer vacation time and occasionally at other holidays; that in the summer of 1983, Adam Francis Jerson visited his mother in Raleigh, North Carolina; that she did not return said child to the custody of his father as contemplated by the parties and that since that time the minor child has been in the exclusive custody of his mother in Raleigh, North Carolina;

That the mother has made no demand for support of said child from Jack T. Jerson and he has made no payment; that he has attempted to reach the child by phone and by letter; that the mother has never notified Jack T. Jerson as to when he might visit the child or have any time alone with the child.

Upon the foregoing findings of fact the Court ORDERS, ADJUDGES, AND DECREES:

1. That Jack T. Jerson has not prior to the 24th day of June, 1985, wilfully abandoned or refused to support the child Adam Francis Jerson; that his failure to visit the child has been due to the fact that he had no assurance [sic] that he would be allowed to see the child if he traveled to Raleigh; that Jack T. Jerson has not foregone all parental duties and has not wilfully relinquished his parental rights to said child

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O'Herron v. Jerson

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[and] that there is no wilful abandonment of said child for the period of six months next preceding June 24, 1985.

WHEREFORE, the petition of James P. O'Herron for the adoption of Adam Francis O'Herron and his petition for an order decreeing that Jack T. Jerson has [will]fully abandoned his minor child, Adam Francis Jerson, is denied.

From the entry of this judgment, petitioner appealed.

*Donald H. Solomon for petitioner-appellant.*

*No brief for respondent-appellee.*

PARKER, Judge.

In his first assignment of error, petitioner contends the judgment should be vacated because there was insufficient evidence presented at trial to support the trial court's findings of fact and conclusions of law. We agree.

Findings of a trial judge sitting as the trier of fact will not be disturbed on appeal on the theory that the evidence did not support the findings if there is any competent evidence to support them. *Mayo v. Mayo*, 73 N.C. App. 406, 326 S.E. 2d 283 (1985). As appears from the record before this Court, the only competent evidence presented was the verified supplemental petition, *Schoolfield v. Collins*, 281 N.C. 604, 189 S.E. 2d 208 (1972) (verified pleadings can be considered as affidavits in the cause) and the sworn testimony of petitioner and his wife. Assuming arguendo that respondent's letters may have constituted an answer within the meaning of the North Carolina Rules of Civil Procedure, see *N.C. State Bar v. Wilson*, 74 N.C. App. 777, 330 S.E. 2d 280 (1985), the trial court was precluded from considering them as affidavits in the cause because they were not verified. *Schoolfield*, *supra*.

In *Brown v. Brown*, 19 N.C. App. 393, 198 S.E. 2d 756 (1973), this Court vacated a judgment which was based upon an unverified complaint and letters and statements that were not made under oath. The court in the case *sub judice* did not strike respondent's letters which were not under oath. As in *Brown*, "[i]t is obvious that some of the material findings of fact could not be based on competent evidence and could not support the judgment." *Id.* at 394, 198 S.E. 2d at 758.

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**Jones v. Lyon Stores**

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The case must, therefore, be remanded for further proceedings and the judgment vacated.

Vacated and remanded.

Chief Judge HEDRICK and Judge WEBB concur.

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LIZZIE JONES v. LYON STORES, D/B/A PEACE STREET OPEN AIR MARKET

No. 8510SC1207

(Filed 5 August 1986)

**Negligence § 57.10— injury from fleeing shoplifting suspect—negligence by store owner—genuine issue of material fact**

A genuine issue of material fact was presented as to whether defendant store owner was negligent in following its policy of locking only the "out" door of the store upon the apprehension of a shoplifting suspect in the store so as to render the owner liable for injuries received by plaintiff when she opened the "in" door to the store and a shoplifting suspect fled through the open "in" door and knocked plaintiff to the ground.

APPEAL by plaintiff from *Barnette, Judge*. Judgment entered 26 July 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 13 March 1986.

Plaintiff appeals from the entry of summary judgment in favor of defendant on plaintiff's claim for personal injury damages arising out of an incident which occurred at defendant's store on 2 December 1983. Plaintiff was a regular shopper at defendant's store on Peace Street in Raleigh. On 2 December 1983, she approached the store to enter through the "In" door. As plaintiff opened the door, a man ran out of the store, knocking her to the ground, causing her serious injury.

Plaintiff's complaint alleges that defendant failed to exercise the care owed to an invitee on its premises; that her injuries were proximately caused by defendant's negligence in locking only the "Out" door thereby making the "In" door the only avenue of escape and that the shoplifter's escape and resulting injury to customers were foreseeable.

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Jones v. Lyon Stores

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The affidavits filed in support of defendant's motion revealed that the man who knocked plaintiff down had been detained in the store by the manager, who suspected him of shoplifting. The routine practice at this store when a suspected shoplifter was caught was to phone the police, lock the exit door and detain the suspect until the police arrived. The entrance door remained unlocked so that customers could still enter the store. On this particular occasion, the routine practice had been followed and the accused shoplifter had been passive and had shown no resistance or signs of attempting to flee. A customer entered the store, and either as the "In" door closed behind him or as it opened for plaintiff, who was immediately behind the first customer, the suspect suddenly bolted through the partly open door and knocked plaintiff to the ground, to make his escape. The "In" door had no handles on the inside; it only opened inward and it was controlled by a hydraulic device. This routine for detaining shoplifters had been followed for over a year at the time of the incident and no shoplifter had ever attempted to run once confronted.

Plaintiff filed an affidavit showing complaints reported to the police for 804 Peace Street during the period from January 1982 through October 18, 1983. This report disclosed sixteen reported larcenies.

Upon defendant's motion for summary judgment, the trial court examined the pleadings and affidavits and concluded that no genuine issue of material fact existed and that defendant was entitled to judgment as a matter of law. Defendant's motion for summary judgment was granted and plaintiff's action was dismissed. Plaintiff appeals.

*Teague, Campbell, Dennis and Gorham by C. Woodrow Teague and Linda Stephens for plaintiff-appellant.*

*Bell, Davis and Pitt, P.A., by William Kearns Davis and Stephen M. Russell for defendant-appellee.*

PARKER, Judge.

The only issue before this Court is whether the entry of summary judgment was appropriate. To be entitled to summary judgment, the moving party must establish that there are no triable issues of material fact, with all factual inferences arising from the

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**Jones v. Lyon Stores**

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evidence being drawn against the movant. *King v. Allred*, 309 N.C. 113, 305 S.E. 2d 554 (1983).

A store owner's duty to invitees to maintain the premises in a reasonably safe condition extends to the manner in which the store owner deals with the criminal acts of third persons. *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 281 S.E. 2d 36 (1981). The issue then is whether in the case *sub judice* defendant breached that duty.

Foreseeability is the test for determining a business owner's duty to safeguard his business invitees from the acts of third persons. *Id.* As stated in *Foster*,

If an invitee, such as the plaintiff in this case, alleges in a complaint that he or she was on the premises of a store owner, during business hours for the purpose of transacting business thereon, and that while he or she was on the premises injuries were sustained from the criminal acts of a third person, *which acts were reasonably foreseeable by the store owner*, and which could have been prevented by the exercise of ordinary care, then the plaintiff has set forth a cause of action in negligence which, if proved, would entitle that plaintiff to recover damages from the store owner.

*Id.* at 640, 281 S.E. 2d at 39 (emphasis added).

The instant case differs from *Foster* in that the third party conduct causing injury is not an intentional criminal act such as an assault, but rather conduct incident to a nonviolent criminal act. In the process of fleeing, the apprehended shoplifting suspect knocked plaintiff down. The questions raised by these facts are whether it was reasonably foreseeable that the suspect would bolt and whether it was reasonably foreseeable that by locking the "Out" door, the defendant's employees increased the risk of harm to invitees on the premises, including plaintiff. In other words, under the circumstances was injury to someone more likely to occur if the suspect could only exit through the "In" door? "An act is negligent if the actor intentionally creates a situation which he knows, or should realize, is likely to cause a third person to act in such a manner as to create an unreasonable risk of harm to another." *Toone v. Adams*, 262 N.C. 403, 409, 137 S.E. 2d 132, 136 (1964).



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**Shipman v. N.C. Private Protective Services Bd.**

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The evidence that the policy of locking the "Out" door had been followed for over a year and that no one previously apprehended had tried to run is evidence to be considered in determining whether the consequences were foreseeable, but we are not prepared to say as a matter of law under the circumstances that defendant satisfied its duty of care to plaintiff. The very fact defendant locked the "Out" door is some indication that defendant anticipated an apprehended shoplifter might try to escape.

As in *Helms v. Church's Fried Chicken, Inc.*, 81 N.C. App. ---, 344 S.E. 2d 349 (1986), the foreseeability of increased risk of injury to plaintiff as a consequence of defendant's employees' acts or failure to act is the issue. The fact that the store owner is dealing with a criminal suspect is an additional factor to be considered in determining the reasonableness of defendant's employees' actions under the circumstances.

This Court is not unmindful of the competing policy considerations ably expressed by Justice Carlton in his dissent in *Foster*, 303 N.C. at 643-647, 281 S.E. 2d at 41-43. The store owner unquestionably has the right to apprehend a shoplifter to retrieve his goods; but in our view, the facts herein require the question of foreseeability of harm to plaintiff, which could have been prevented by the exercise of ordinary care, to be answered by a jury.

Reversed and remanded.

Judges WEBB and EAGLES concur.

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JOHN T. SHIPMAN v. NORTH CAROLINA PRIVATE PROTECTIVE SERVICES BOARD

No. 8510SC967

(Filed 5 August 1986)

**1. Constitutional Law § 12.1— licensing of private investigators—due process**

The Private Protective Services Act, which pertains to the licensing of private investigators, is rationally related to a legitimate governmental purpose of regulating an occupation engaging in many of the same activities as public police officers and thus does not violate the guarantee of due process contained in the Fifth and Fourteenth Amendments to the U.S. Constitution or

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**Shipman v. N.C. Private Protective Services Bd.**

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the "law of the land" clause of Art. I, § 19 of the N.C. Constitution. N.C.G.S. § 74C-1 *et seq.*

**2. Constitutional Law § 20.1— licensing of private investigators—equal protection**

Statutes pertaining to the licensing of private investigators do not violate equal protection because N.C.G.S. § 74C-3(b) exempts certain occupations from regulation under the statutes since the exceptions merely exempt those occupations regulated elsewhere, and such classification is reasonably related to the purpose of the statutes.

APPEAL by petitioner from *Battle, Judge*. Judgment entered 3 April 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 5 February 1986.

Petitioner is a private investigator and respondent is the agency charged by statute with promulgating and enforcing rules governing the licensing of private investigators in this State. *See* G.S. 74C-1, *et seq.* On 17 February 1983, respondent suspended the license of petitioner for six months for violations of Board rules. Petitioner challenged the suspension in Superior Court alleging, among other things, that the statute authorizing the Private Protective Services Board to grant, suspend or revoke the licenses of private investigators is a violation of the constitutional guarantees, both under the State and Federal Constitutions, of due process and equal protection. The Superior Court upheld the suspension and petitioner appeals.

*Clifton and Singer by Benjamin F. Clifton, Jr. and W. Robert Denning, III for petitioner-appellant.*

*Attorney General Lacy H. Thornburg by Assistant Attorney General Edmond W. Caldwell, Jr. for respondent-appellee.*

PARKER, Judge.

The only issue raised by petitioner on this appeal is the constitutionality of the Private Protective Services Act, G.S. 74C-1, *et seq.*

[1] First, petitioner argues that the statute violates the guarantee of due process contained in the Fifth and Fourteenth Amendments to the Federal Constitution and the "law of the land" clause of Article I, Section 19 of the North Carolina Constitution. Second, petitioner asserts that the statute infringes upon his right to equal protection of the laws, guaranteed by the Four-

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**Shipman v. N.C. Private Protective Services Bd.**

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teenth Amendment to the U.S. Constitution and Article I, Section 19 of the State Constitution.

When confronted with a challenge to a validly adopted statute, the courts must assume that the General Assembly acted within its constitutional limits unless the contrary clearly appears. *Roller v. Allen*, 245 N.C. 516, 96 S.E. 2d 851 (1957). For a statute to be within the limits set by the federal due process clause and the North Carolina "law of the land" provision, all that is required is that the statute serve a legitimate purpose of state government and be rationally related to the achievement of that purpose. *E.g.*, *Dalton v. Bob Neill Pontiac, Inc.*, 476 F. Supp. 789 (M.D. N.C. 1979), *aff'd*, 628 F. 2d 1348 (4th Cir. 1980); *Hartford Acc. and Indem. Co. v. Ingram*, 290 N.C. 457, 226 S.E. 2d 498 (1976).

The purpose of the Private Protective Services Act is to regulate those professions which charge members of the public a fee for engaging in many activities which overlap the functions of our public police. We note that petitioner is challenging the entire Act which includes some occupations in the performance of which the individuals carry firearms and wear uniforms. G.S. 74C-3(a)(8) defines private detective as follows:

- (8) "Private detective" or "private investigator" means any person who engages in the business of or accepts employment to furnish, agrees to make, or makes an investigation for the purpose of obtaining information with reference to:
- a. Crime or wrongs done or threatened against the United States or any state or territory of the United States;
  - b. The identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person;
  - c. The location, disposition, or recovery of lost or stolen property;
  - d. The cause or responsibility for fires, libels, losses, accidents, damages, or injuries to persons or to properties,

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**Shipman v. N.C. Private Protective Services Bd.**

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provided that scientific research laboratories and consultants shall not be included in this definition;

- e. Securing evidence to be used before any court, board, officer, or investigation committee; or
- f. Protection of individuals from serious bodily harm or death.

However, the employee of a security department of a private business which conducts investigations exclusively on matters internal to the business affairs of the business shall not be required to be licensed as a private detective or investigator under this Chapter.

Regulating an occupation which engages in many of the same activities as our public police officers is clearly a legitimate purpose of state government. *See Lehon v. City of Atlanta*, 242 U.S. 53, 37 S.Ct. 70, 61 L.Ed. 145 (1916). As noted by the New Jersey Supreme Court in *Schulman v. Kelly*, 54 N.J. 364, 255 A. 2d 250 (1969), "the business of private detective has an inherent potential for abuse, and . . . its strict regulation including control of those persons who desire to enter that business, is clearly within the public interest."

Licensing of private detectives is a common mechanism utilized by states to regulate the profession. *See, e.g., Lehon, supra; Wayne v. Bureau of Private Investigators and Adjusters*, 201 Cal. App. 2d 427, 20 Cal. Rptr. 194 (1962). *See also* 86 A.L.R. 3d 691 (1978). Licensing provides a supervisory agency with the authority to enforce the legitimate requirements that a private detective be of age, be of good moral character and have some measure of investigatory experience.

[2] Petitioner also argues that the Private Protective Services Act violates the constitutional guarantee of equal protection of the laws by allowing others to engage in the practice of investigation without meeting the licensing requirements of the statute. Specifically, petitioner points to G.S. 74C-3(b), which exempts from regulation under the Private Protective Services Act insurance adjusters, credit rating services, attorneys, company or railroad police, and holders of liens on personal property when engaging in repossession of that property. A classification by statute, if it is not constitutionally suspect such as a racial classifica-

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**Schuch v. Hoke**

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tion, need only be reasonably related to the purposes of the statute. *State v. Greenwood*, 280 N.C. 651, 187 S.E. 2d 8 (1972). The classification is valid so long as the statute similarly treats all those similarly situated. The exceptions in G.S. 74C-3(b) are a recognition by the General Assembly that all those who could conceivably fit within the definitions of those occupations covered by the Act are not similarly situated. Those exceptions serve merely to exempt those occupations regulated elsewhere in state or federal law, often more extensively than the regulation of private investigators. Thus, the classification is reasonably related to the purposes of the statute, in that it requires the respondent Private Protective Services Board to license only those individuals engaged in a covered occupation not regulated elsewhere.

Petitioner has failed to demonstrate that the Legislature exceeded its authority in enacting the Private Protective Services Act. The judgment below is

Affirmed.

Chief Judge HEDRICK and Judge WEBB concur.

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BARBARA WALL BARHAM SCHUCH v. WILLIAM R. HOKE, ADMINISTRATOR  
OF THE ESTATE OF KELLIE CAMELLE LLOYD, DECEASED

No. 8610SC53

(Filed 5 August 1986)

**Appeal and Error § 6.2— partial summary judgment—not immediately appealable**

In an action arising from an automobile accident, a partial summary judgment in plaintiff's favor on the issues of negligence, contributory negligence, and assumption of risk was not immediately appealable despite the trial court's recital that the order was a final judgment and there was no just reason for delay.

APPEAL by defendant from *Bailey, Judge*. Order entered 20 August 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 3 June 1986.

Plaintiff, a guest passenger in an automobile operated by defendant-administrator's decedent, sustained injuries when the

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**Schuch v. Hoke**

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automobile crossed the center line of a highway and collided with another vehicle. She seeks damages for those injuries.

The trial court granted plaintiff's motion for partial summary judgment in her favor on the issue of negligence. Defendant does not appeal from that order. The court also granted plaintiff's motion for partial summary judgment in her favor on the issues of her contributory negligence and assumption of risk. The order granting this motion states that "this is a final judgment as to one, but not all, of the claims, and . . . there is no just reason for delay in the appeal of this partial summary judgment on the issues of contributory negligence and assumption of risk . . . ."

From this order, defendant appeals.

*Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Sanford W. Thompson, IV, for plaintiff appellee.*

*Walter L. Horton, Jr., for defendant appellant.*

WHICHARD, Judge.

Neither party has argued the threshold question of whether an appeal lies from the order. However, "[i]t is well established in this jurisdiction that if an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves." *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E. 2d 431, 433 (1980). On the authority of *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979), we dismiss this appeal as premature.

In *Industries, Inc.* our Supreme Court held that an order granting plaintiff's motion for partial summary judgment on the issue of liability, reserving for trial the issue of damages, was an interlocutory order not subject to immediate appeal. The Court stated:

[D]efendant has referred us to no case nor has our research revealed one holding that a partial summary judgment entered for plaintiff on the issue of liability only leaving for further determination at trial the issue of damages is immediately appealable by defendant. The cases uniformly hold to the contrary.

*Id.* at 492, 251 S.E. 2d at 448.

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Schuch v. Hoke

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The defendant here is in precisely the same position as the defendant in *Industries, Inc.* The effect of the partial summary judgment orders, which established the negligence of defendant-administrator's decedent and the absence of contributory negligence or assumption of risk on the part of plaintiff, was to fix liability and retain the cause for determination solely on the issue of damages. See *Insurance Co. v. Dickens*, 41 N.C. App. 184, 186, 254 S.E. 2d 197, 198 (1979). Thus, as in *Industries, Inc.*, "[e]ven if defendant is correct on its legal position, the most it will suffer from being denied an immediate appeal is a trial on the issue of damages." *Industries, Inc.*, 296 N.C. at 491, 251 S.E. 2d at 447.

The [defendant] here, as the defendant in *Industries, Inc.*, can preserve the right to have appellate review of all trial court proceedings by duly entered exceptions on appeal from the final judgment. All reasons advanced by our Supreme Court in *Industries, Inc.* against permitting fragmentary, premature, and unnecessary appeals, apply with equal force in the present case.

*Insurance Co.*, 41 N.C. App. at 186, 254 S.E. 2d at 198.

In *Industries, Inc.*, as here, the order contained a recital that "this is a final judgment and there is no just reason for delay." *Industries, Inc.*, 296 N.C. at 488, 251 S.E. 2d at 445. As the Supreme Court stated there, however, "[t]hat the trial court declared it to be a final . . . judgment does not make it so." *Id.* at 491, 251 S.E. 2d at 447. "[A] trial judge [cannot] by denominating his decree a 'final judgment' make it immediately appealable under Rule 54(b) if it is not such a judgment." *Id.* See also *Cook v. Tobacco Co.*, 47 N.C. App. 187, 266 S.E. 2d 754 (1980).

The order appealed from here, like that in *Industries, Inc.*, is not a final judgment as to any claim or any party. The Rule 54(b) role of the trial court as "the 'dispatcher' of cases to the appellate court," *Leasing Corp. v. Myers*, 46 N.C. App. 162, 165, 265 S.E. 2d 240, 243, appeal dismissed, 301 N.C. 92 (1980), thus is not implicated. *Industries, Inc.*, 296 N.C. at 491, 251 S.E. 2d at 447.

Appeal dismissed.

Judges WEBB and JOHNSON concur.

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Nationwide Mut. Ins. Co. v. Massey

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NATIONWIDE MUTUAL INSURANCE COMPANY AND CHW CORPORATION, PLAINTIFFS v. MATTHEW SCOTT MASSEY AND MICHAEL MASSEY AND GRACE B. LASSITER, ADMINISTRATRIX OF THE ESTATE OF ISAIAH MALLIE LASSITER, AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, DEFENDANTS v. NATIONWIDE MUTUAL INSURANCE COMPANY AND CHW CORPORATION AND NORTHERN ASSURANCE COMPANY OF AMERICA, THIRD-PARTY DEFENDANTS

No. 8615SC114

(Filed 5 August 1986)

**Insurance § 69— automobile accident—two insurers**

In an action arising from an automobile insurance policy in which the deceased was covered by the North Carolina Farm Bureau Mutual Insurance Company for bodily injuries for \$100,000 and the driver at fault was covered by Nationwide for \$60,000, the trial court erred by entering summary judgment for the administratrix of the estate for the full \$100,000 under the Farm Bureau policy in addition to the amount owed by Nationwide. The Farm Bureau policy required that coverage be limited by reducing the amount payable by all sums paid by or for anyone who was legally responsible.

APPEAL by defendant North Carolina Farm Bureau Mutual Insurance Company from *Bowen (Wiley F.)*, Judge; *Preston*, Judge and *Battle*, Judge. Judgments entered 2 May 1985, 29 August 1985, and 28 October 1985 in Superior Court, ORANGE County. Heard in the Court of Appeals 5 June 1986.

The administratrix of the estate of Isaiah Mallie Lassiter obtained a judgment of \$240,000.00 against Matthew Scott Massey in a wrongful death action arising from an automobile accident which occurred on 6 March 1982. At the time of the accident, Massey was driving a van owned by CHW Corporation and insured by Nationwide Mutual Insurance Company (Nationwide). The Nationwide policy provided automobile liability coverage of \$60,000.00. The decedent Isaiah Mallie Lassiter had an automobile policy with North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) which provided coverage for his bodily injuries. The stated limit of the Farm Bureau policy was \$100,000.00.

As the result of a declaratory judgment action filed by Nationwide and CHW Corporation, the trial court found Nationwide liable to the administratrix for the full \$60,000.00 of its policy limits.



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Nationwide Mut. Ins. Co. v. Massey

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In a cross-claim against Farm Bureau pursuant to the declaratory judgment action, the administratrix sought payment of the full \$100,000.00 under the decedent's Farm Bureau policy. Upon summary judgment motions by both parties, the trial court held that Farm Bureau was liable to the estate in the amount of its policy limits (\$100,000.00) in addition to the amount owed by Nationwide, and thus granted summary judgment in favor of the administratrix. From the judgments of the trial court, defendant Farm Bureau appeals.

*Haywood, Denny, Miller, Johnson, Sessoms & Haywood, by Michael W. Patrick, for appellant.*

*Pulley, Watson, King & Hofler, by R. Hayes Hofler, III, for appellee.*

ARNOLD, Judge.

Farm Bureau contends that the trial court erred in granting summary judgment for the administratrix and in denying its motion for summary judgment. Specifically, Farm Bureau contends that the trial court's interpretation was contrary to both the language of the policy and the applicable North Carolina case law. We agree.

The decedent's Farm Bureau policy provided coverage for bodily injury resulting from an accident caused by the owner or driver of a vehicle "[f]or which the sum of all bodily injury liability . . . policies at the time of an accident provides at least the amounts required [by statute] but their limits are less than the limits of this insurance. . . ." The endorsement which provided this coverage also required that "[a]ny amount payable under this insurance shall be reduced by . . . [a]ll sums paid by or for anyone who is legally responsible, including all sums paid under the policy's LIABILITY INSURANCE." Thus, under the provisions of the Farm Bureau policy, the \$60,000.00 paid by Nationwide should be deducted from the \$100,000.00 Farm Bureau policy limit, leaving Farm Bureau liable for \$40,000.00 under its policy.

The confusion in this case arises because the endorsement which provides the cited coverage is entitled "UNINSURED MOTORISTS INSURANCE." The policy's definition of "uninsured motor vehicle" includes the above cited language providing coverage for

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**State v. Wright**

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bodily injury. This language tracks the statutory definition of "underinsured" motorist coverage. *See* G.S. 20-279.21 (1981). Yet, no matter how the insurance coverage is denominated, the policy requires that the coverage is to be limited by reducing the amount payable by all sums paid by or for anyone who is legally responsible. To the extent coverage provided by motor vehicle liability insurance policies exceeds the mandatory minimum coverage required by statute, the additional coverage is voluntary, and is governed by the terms of the insurance contract. *Government Employees Insurance Co. v. Herndon*, 79 N.C. App. 365, 339 S.E. 2d 472 (1986). The Farm Bureau coverage does exceed the statutory minimum. *See* G.S. 20-279.21 (1981). We therefore find that the trial court's conclusion that Farm Bureau was liable for \$100,000.00 in addition to the amount owed by Nationwide, and the court's entry of summary judgment for the administratrix, were in error.

The judgments of the trial court are reversed, and the cause is remanded to the Superior Court of Orange County for entry of judgment awarding the administratrix \$40,000.00 pursuant to the Farm Bureau policy.

Reversed and remanded.

Judges WELLS and BECTON concur.

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STATE OF NORTH CAROLINA v. TERRY WRIGHT

No. 8626SC55

(Filed 5 August 1986)

**Criminal Law § 98— shackled defendant—no prejudice**

There was no prejudicial error in a trial in which defendant was shackled where defendant did not testify and the record contains no indication that the jury saw or was told about the shackles; the record shows that an oversized briefcase was placed behind defendant's chair to prevent the jury from seeing the shackles; the jury was not brought into the courtroom until after defendant was seated at his table with his feet underneath it; and the trial judge found without exception that the jury did not see the shackles.

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State v. Wright

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APPEAL by defendant from *Downs, Judge*. Judgments entered 31 July 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 4 June 1986.

*Attorney General Thornburg, by Assistant Attorney General Lucien Capone III, for the State.*

*Appellate Defender Hunter, by Assistant Appellate Defender David W. Dorey, for defendant appellant.*

PHILLIPS, Judge.

Defendant was convicted of four counts of armed robbery in violation of G.S. 14-87. His request for a new trial is based upon a solitary assignment of error which contends that the presumption of innocence that is the right of each person tried for crime in this country was undermined "in the eyes of the jurors" by the court erroneously trying him in leg shackles and in failing to take adequate "remedial measures" to prevent the prejudice. The following legal principles, basic to restraining defendants in court and recognized by both parties in their briefs, are pertinent: There is no ban, constitutional or otherwise, against physical restraint in the courtroom *per se*. Our law permits a defendant to be physically restrained during his trial when restraint is necessary to maintain order, prevent the defendant's escape, or protect the public. *United States v. Samuel*, 431 F. 2d 610, 433 F. 2d 663 (4th Cir. 1970), *cert. denied*, 401 U.S. 946, 28 L.Ed. 2d 229, 91 S.Ct. 964 (1971); *State v. Tolley*, 290 N.C. 349, 226 S.E. 2d 353 (1976); G.S. 15A-1031. What is forbidden—by the due process and fair trial guarantees of the Fourteenth Amendment to the United States Constitution and Art. I, Sec. 19 of the North Carolina Constitution—is physical restraint that improperly deprives a defendant of a fair trial. *United States v. Samuel, supra*; *State v. Tolley, supra*.

Defendant's assignment of error is contradicted by the record and we overrule it. Instead of showing that defendant lost favor with the jury because of the shackles the record shows that the jurors did not see or know that defendant was in shackles and thus could not have drawn any conclusions unfavorable to him either from the shackles or from the court's alleged failure to take adequate remedial measures in regard to them. The defendant did not testify and the record contains no indication that the jury saw

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*State v. Wright*

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or was told about the shackles. On the other hand, the record shows that to prevent the jury from seeing the shackles on defendant's legs an oversized briefcase was placed behind his chair, the jury was not brought into the courtroom each time until after defendant was seated at his table with his feet underneath it, and that the trial judge found, without defendant excepting thereto, that the jury did not see the shackles. Since new trials are granted only for errors that are prejudicial, *State v. Milby*, 302 N.C. 137, 273 S.E. 2d 716 (1981), and it is clear to us from the record, and we so find, that any error the court may have committed in regard to the shackles "was harmless beyond a reasonable doubt," G.S. 15A-1443(b), a discussion of the court's alleged errors in regard to the shackles would be pointless. In a similar case where the record also showed that the defendant was not prejudiced by being restrained during his trial the Minnesota Supreme court declined to determine whether the trial court erred in restraining him. *State v. Scott*, 323 N.W. 2d 790 (Minn. 1982).

No error.

Judges MARTIN and PARKER concur.

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**Knight v. Cannon Mills Co.**

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BARNEY E. KNIGHT, EMPLOYEE v. CANNON MILLS COMPANY, SELF-INSURED,  
EMPLOYER

No. 8610IC271

(Filed 19 August 1986)

**1. Master and Servant § 68— byssinosis—workers' compensation denied—findings supported by evidence**

The Industrial Commission did not err by finding that a byssinosis plaintiff was exposed to some cotton dust while he worked for defendant but that there was no credible evidence as to the extent of plaintiff's exposure where plaintiff's evidence as to the extent of his exposure was ambiguous and vague and there was independent evidence of plaintiff's lack of credibility as a witness.

**2. Master and Servant § 68— byssinosis—workers' compensation denied—finding that disease was caused by factors not related to occupation—supported by evidence**

The Industrial Commission's finding that plaintiff's lung disease was caused by factors unrelated to his occupation was supported by the evidence where there was medical evidence that plaintiff's lung disease could be explained entirely by his heavy cigarette consumption over many years; there was medical evidence that it was not clear that cotton dust played any contributory role in that there was a lack of evidence of the extent of exposure, Monday Morning Syndrome was absent, and plaintiff represented that his symptoms were no worse at work than at home and that they did not improve on weekends or vacations; and there was medical evidence that plaintiff had emphysema and that his degree of pulmonary impairment could be explained by his emphysema alone.

**3. Master and Servant § 68— cotton dust—estoppel not applied—no error**

The Industrial Commission did not err in a cotton dust case by failing to find facts on the issue of estoppel or by suppressing evidence relevant to estoppel where the record does not show that plaintiff's medical director committed perjury as alleged by plaintiff; the failure to submit forms to the Industrial Commission notifying it of an occupational injury or disease and the failure to obtain approval for payments of plaintiff's medical expenses did not deprive plaintiff of notice that his disease could have been compensable; payment of plaintiff's medical expenses by defendant was not an admission of liability; there was evidence that defendant believed the lung disease was not caused by exposure to cotton dust; the denial of compensation was not based on the time-barred defense but on plaintiff's failure to present sufficient credible evidence of the extent of exposure to cotton dust; and there was no reason to extend the estoppel doctrine to prevent defendant from denying the extent of plaintiff's exposure or that it caused the lung disease. N.C.G.S. § 97-58(c) (1985), N.C.G.S. § 97-90, N.C.G.S. § 97-92 (1985).

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**Knight v. Cannon Mills Co.**

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APPEAL by plaintiff from an Opinion and Award of the North Carolina Industrial Commission filed 30 September 1985. Heard in the Court of Appeals 10 June 1986.

*Lore & McClearen, by R. James Lore, for plaintiff appellant.*

*Teague, Campbell, Dennis & Gorham, by George W. Dennis III, for defendant appellee.*

BECTON, Judge.

This appeal is from a denial of workers' compensation benefits claimed by Barney E. Knight under N.C. Gen. Stat. Sec. 97-53(13) (1985).

I

Barney Knight is in his late fifties. His formal education ended after the first grade; he cannot read, write, or sign his name; and he does not know his date of birth. The precise history of his employment is the subject of some dispute, but all parties agree that he worked on and off in the textile industry until 16 March 1981 when he last worked for defendant Cannon Mills.

Knight has chronic obstructive pulmonary disease which, according to Dr. Douglas G. Kelling, Jr., a pulmonary specialist and member of the Commission's Textile Occupational Disease Panel, contributes to his inability to engage in certain activities. The pulmonary disease is a combination of chronic bronchitis, emphysema and asthma. Knight has a long history of cigarette smoking, although the evidence is conflicting as to the average number of packs per day. Other significant conditions contributing to his physical impairment include: (1) chronic alcoholism; (2) a leg injury causing limited motion in his right knee, and (3) a clouded left cornea causing significant visual impairment. These conditions are not work-related.

Knight's lung disease was first diagnosed in 1977 by Cannon Mills' consulting physician, Dr. Kelling. According to his diagnosis, Knight's lung disease appeared to be "on the basis of his heavy cigarette smoking and exposure to cotton dust." He recommended that Knight work in areas where his exposure to cotton dust would be minimal, that he have annual lung function tests, that he stop smoking, and that he regularly see a physician

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**Knight v. Cannon Mills Co.**

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for treatment of his lung disease. This report was sent to Dr. Vernon Burkhart, medical director for Cannon Mills. In early 1978, Dr. Burkhart stamped Knight's employment records to indicate that he should not work in dust or toxic fumes and that "workers' compensation" should be notified before Knight took a leave of absence or was terminated. Knight was then transferred to the yard force where dust exposure was minimal. He worked in the yard and the bleachery until his last day of work in 1981. The Industrial Commission was never notified by Cannon Mills of Knight's condition.

Cannon Mills claims, and Knight denies, that when Dr. Burkhart met with Knight in 1978, the doctor showed to him and explained the 1977 report and diagnosis by Dr. Kelling. Dr. Burkhart testified that he read to Knight a letter dated 12 January 1978, which stated that, according to separate tests conducted by Cannon Mills and Dr. Kelling, Knight's condition may be due to allergies and exposure to lung irritants, including smoke and cotton dust. Dr. Burkhart testified that after he read the letter to Knight, Knight marked it with an "X." Knight denies he was told of Dr. Kelling's diagnosis. He testified that Dr. Burkhart handed him a letter, without explanation and with an "X" already on it.

Knight claims he was first told that his lung disease might have been caused in part by cotton dust exposure by Dr. Kelling in October 1983. He filed a claim for benefits on 6 March 1984. Knight was then referred by the Commission to Dr. Charles D. Williams, Jr., another member of the Textile Occupational Disease Panel. Dr. Williams' report was placed in the record. Although Dr. Kelling had recorded Knight's smoking history as one-half pack per day for thirty-seven years, Dr. Williams recorded it as three to four packs per day for over forty years until 1983 when Knight cut down to one-half pack per day. Dr. Williams' extensive and detailed report states in part:

This combination of chronic bronchitis, pulmonary emphysema, and asthma is frequently referred to as chronic obstructive pulmonary disease. The entire problem could be accounted for by his many years of heavy cigarette smoking. It would not be necessary to invoke any other etiology to produce this degree of impairment. It is not at all clear to this examiner whether cotton dust played any contributory

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**Knight v. Cannon Mills Co.**

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role in his impairment. The reasons for this uncertainty are numerous. It is not clear how much of his work experience was carried out in an at-risk area. He certainly does not give a history of "Monday Morning Syndrome"; however, he is a very poor historian with admittedly defective memory. It would not appear that his respiratory symptoms were any worse at work than at home. I do not find any pulmonary function studies which were clearly labelled as being done before and after exposure to the work environment. The pulmonary function studies which are available indicate a significant degree of airway obstruction and might not show evidence of cotton dust sensitivity even if such were present previously. Cotton dust has been implicated as a cause of chronic bronchitis even in nonsmokers and could have played a contributory role in the production of his chronic obstructive pulmonary disease.

Cannon Mills denied liability for Knight's disease on the ground that it was not work-related. It also pleaded that Knight's claim had been filed too late.

At the hearing before the deputy commissioner, Knight offered evidence to show that Cannon Mills should be estopped to plead that his claim was time barred. Knight alleged that Cannon Mills induced him to delay filing a claim by paying his medical bills and by failing to tell him that his lung disease was work-related. Knight also asserted that Cannon Mills knew Knight had an occupational lung disease in 1977, failed to notify the Commission of this valid claim and failed to get the Commission's approval for medical payments made on Knight's behalf.

Knight also alleges that Cannon Mills is engaged in a pattern of intentionally deceiving employees about the causes of their lung diseases. He claims Cannon Mills has conspired with doctors who conduct medical examinations of Cannon Mills' employees to suppress knowledge of the occupational nature of the lung diseases they discover. He alleges that payments of medical bills are made without Commission approval in order to further suppress this information and to prevent the Commission from notifying the employees.

The deputy commissioner suppressed certain evidence offered by Knight at the hearing. The evidence suppressed by the



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**Knight v. Cannon Mills Co.**

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deputy commissioner proved that Cannon Mills paid for the drug prescriptions and medical expenses relating to Knight's respiratory problems from 1977 to 1984 and that some of the bills contained words such as "workers' compensation." The deputy commissioner originally allowed the evidence at the hearing and reserved ruling on Cannon Mills' objections until after all the testimony. In her opinion and award, the deputy commissioner addressed Cannon Mills' objection and explained that Knight had offered the evidence "in order for him to show action of Cannon Mills which would estop Cannon Mills from pleading the two-year bar of G.S. 97-58." She then sustained the objection.

The deputy commissioner also ruled on Cannon Mills' objection to a hypothetical question that had been posed to Dr. Kelling. The objection was based on the ground that it assumed facts not in evidence. This ruling was also reserved pending introduction of the assumed facts, because Dr. Kelling's testimony had been taken out of turn. In her opinion and award, the deputy commissioner sustained the objection to the hypothetical question.

The deputy commissioner also made the following relevant findings of fact:

1. [Plaintiff's] . . . memory is poor.
2. Beginning in the 1940's plaintiff worked for various textile companies, including Springs Industries and defendant, with whom he started employment in 1953. Although plaintiff was exposed to some cotton dust while he worked for defendant, there is no credible evidence as to the extent of plaintiff's exposure.
3. Plaintiff began smoking an average of three to four packs of cigarettes per day at the age of fourteen. In 1983 or 1984, he decreased his consumption to a half a pack of cigarettes per day. As a result of his heavy cigarette consumption, plaintiff has chronic obstructive pulmonary disease, which is a combination of chronic bronchitis, pulmonary emphysema, and asthma. There is no other significant etiological factor involved in the development or aggravation of plaintiff's chronic obstructive pulmonary disease.

Based on these findings, the deputy commissioner concluded as a matter of law:

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**Knight v. Cannon Mills Co.**

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Plaintiff's chronic obstructive pulmonary disease is due to causes and conditions which are not characteristic of the textile industry, is due to causes to which the general public is equally exposed outside the textile industry, and is, therefore, not compensable. G.S. 97-53(13).

Compensation was denied, and the full Commission affirmed.

On appeal, Knight argues that (1) the Commission erred in suppressing evidence of Cannon Mills' past conduct because that evidence is relevant to Knight's theory of estoppel; (2) the evidence and findings do not support the conclusion that Knight did not have an occupational disease; (3) the Commission abused its discretion in finding there was no credible evidence of the extent of exposure; and (4) the finding that Knight's exposure to cotton dust did not aggravate his lung disease is not supported by competent evidence.

We find no merit in Knight's arguments, and we affirm the decision below. First, we consider Knight's second, third and fourth arguments, relating to the sufficiency of the evidence and findings. Then we address his first argument, involving equitable estoppel.

## II

Our review of an Opinion and Award by the Commission is limited to questions of law. We may consider whether there is competent evidence to support the Commission's findings of fact and whether the findings support the conclusions of law. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981). The Industrial Commission is "the sole judge of the credibility of the witnesses and the weight to be given to their testimony. The Commission may accept or reject the testimony of a witness solely on the basis of whether it believes the witness or not." *Hilliard v. Apex Cabinet Company*, 305 N.C. 593, 595, 290 S.E. 2d 682, 683-84 (1982) (citation omitted). The appellate courts cannot disturb the Commission's findings if they are supported by competent evidence, even when there is evidence to support contrary findings. *Id.*

Knight argues that the Commission abused its discretion in making findings not supported by competent evidence. We disagree.

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**Knight v. Cannon Mills Co.**

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**A**

[1] Knight challenges the finding that “[a]lthough plaintiff was exposed to some cotton dust while he worked for defendant, there is no credible evidence as to the extent of plaintiff’s exposure.”

At the outset, we note that the Commission’s finding must be taken in context. The first part of the sentence acknowledges some exposure, and the second part states there is no competent evidence of the extent of the exposure. Thus, the Commission found there is evidence of some degree of exposure, but that there is insufficient credible evidence of the various exposure levels and the duration of the exposure to support a finding that it contributed to or aggravated the lung disease.

At the hearing before the deputy commissioner, plaintiff’s counsel called Dr. Kelling to testify first. Dr. Kelling was asked to answer questions based on an assumption of a long series of facts regarding numerous intermittent periods from 1944 to 1981 during which Knight apparently worked in the textile industry. Many of these short periods of employment were in jobs involving some exposure to cotton dust. Defense counsel objected to the introduction of facts not in evidence. The deputy commissioner allowed the doctor to testify and reserved ruling on the objection until plaintiff had the chance to introduce those facts into evidence during his testimony.

When plaintiff testified, the following exchange took place:

Q. Were you present this morning when I was asking questions to Dr. Douglas G. Kelling, Jr. about you? Were you present here in the Courtroom?

A. Yes, sir.

Q. Did you hear me ask him about places where you might have been employed and what you might have done in those places and when you were employed there and what the dust conditions were? Did you hear me ask him that?

A. Yes, sir.

Q. Now, to the best of your knowledge, was the times and so forth that I asked him that question about correct?

A. Right—yes, sir—you asked it.

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**Knight v. Cannon Mills Co.**

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We find it difficult to draw any conclusion from this ambiguous testimony, and we conclude the Commission did not abuse its discretion in finding that it lacked credibility. Even assuming Knight meant to say "yes, the dates, places and conditions of my exposure were accurate," the details of the *extent* of the exposure were vague in the original hypothetical question to Dr. Kelling, and there is independent evidence of Knight's lack of credibility as a witness. His testimony, especially on cross-examination, revealed that his memory is very poor, and Dr. Williams reported that Knight was a "very poor historian," with an "admittedly defective memory." The evidence suggests that Knight gave conflicting accounts of his smoking history to two doctors and that he denied a childhood history of asthma that was reflected in his medical records. Other weaknesses appear in his testimony on cross-examination.

We conclude that the deputy commissioner did not err in excluding the facts assumed in the hypothetical posed to Dr. Kelling. The Commission was free to assess the credibility of this testimony as to these periods of exposure.

Knight also relies on documentary evidence to demonstrate that there was competent evidence of the extent of exposure. Knight asserts that the attorney for Cannon Mills would not stipulate as to the admissibility of many of these documents. Apparently, there was some confusion about which documents Cannon Mills would stipulate in evidence. This may be a result of a late change in defense attorneys. Nonetheless, the alleged documents are not part of the record, and their absence from the record is not the subject of an exception or an assignment of error. Therefore, they are not properly considered by this Court.

Other documents were stipulated in evidence and can be considered. We have reviewed these records and cannot say the Commission abused its discretion in finding that they did not establish the extent of Knight's exposure. The employment records go back only to July 1953. They indicate the occupations of Knight, but not his levels of exposure. As of 23 January 1977, he was transferred to the street force, outside the mill. Thereafter, he worked outside the mill or in the non-dust environment of the bleaching department.

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Knight v. Cannon Mills Co.

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Knight also relies on the records of cotton dust level measurements at Cannon Mills. But Knight has not shown that these records relate to the specific times or areas in which he worked. Although they may support inferences contrary to the Commission's findings, the Commission was free to conclude that they failed to provide credible evidence of this plaintiff's degree and duration of exposure.

We also reject Knight's implicit argument that because Dr. Kelling believed Knight's lung disease was caused by cotton dust exposure, the pulmonary function studies he relied on must be competent evidence of exposure. Dr. Williams explained that none of these pulmonary function studies was clearly labeled as having been conducted before and after Knight's exposure to the work environment. Furthermore, there is no dispute that Knight was exposed to cotton dust; the controversy is whether the extent of the exposure was sufficient to convince the Commission that it was a significant causal factor in the development or aggravation of the lung disease. Neither the pulmonary function studies nor Dr. Kelling's testimony provides clear evidence of the extent of Knight's exposure. There may be credible evidence of *some* exposure, without sufficient credible evidence of its degree or duration.

Finally, we hold that Cannon Mills did not waive its objection to the evidence of the extent of exposure by receiving an unfavorable response to a hypothetical question. Dr. Kelling stated on cross-examination that his opinion regarding Knight's exposure would not change if the Commission found that Knight had worked at Cannon Mills in dust for less than eight years. But this response may have been based on Dr. Kelling's belief that Knight had worked in dust for many years before working for Cannon Mills. Further, the question was hypothetical and did not operate as an admission by the propounder that Knight's exposure had been at a certain level. Moreover, even Dr. Kelling testified that, as a rule of thumb, it takes ten years of continuous exposure before the permanent effects of cotton dust are noted.

We do not agree with Knight that all the evidence, including defendant's, clearly establishes the extent of Knight's exposure. Knight clearly could not remember the extent to which he was exposed, let alone where or when he worked in textile jobs, and

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**Knight v. Cannon Mills Co.**

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none of the reports or studies demonstrates the level or duration of Knight's exposure. In fact, Dr. Williams specifically stated in his report, "It is not clear how much of [Knight's] work experience was carried out in an at-risk area."

The Commission did not abuse its discretion in finding no credible evidence of the extent of exposure.

**B**

[2] Knight asserts that there is no competent evidence to support the finding and conclusion that the disease was caused by factors unrelated to his occupation. We disagree.

Contrary to Knight's assertions, Dr. Williams' report provides ample evidence to support the Commission's finding. He clearly stated that Knight's lung disease could be explained entirely by his heavy cigarette consumption over many years. Dr. Williams also reported that it was "not at all clear to this examiner whether cotton dust played *any contributory role* in his impairment." (Emphasis added.) He cited numerous reasons for this uncertainty, including the lack of evidence of the extent of exposure, the absence of any history of "Monday Morning Syndrome" (which would indicate that the periodic return to a dusty work area was causing the lung problem), and Knight's representations that his symptoms were no worse at work than at home and that they did not improve on weekends or vacations.

Both Drs. Kelling and Williams found that Knight had emphysema. Dr. Kelling testified that Knight's degree of pulmonary impairment could be explained by his emphysema alone. Dr. Kelling also testified that there is nothing in the medical literature that establishes to a reasonable degree of medical certainty that emphysema is caused or accelerated by exposure to cotton dust. There was strong evidence that Knight's cigarette smoking—three to four packs per day for over forty years—caused the lung disease.

The Commission found that cotton dust did not contribute to Knight's disease, although there is evidence in the record to the contrary. For example, Dr. Williams conceded at the end of his report that:

Cotton dust has been implicated as a cause of chronic bronchitis even in non-smokers and could have played a contribu-

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Knight v. Cannon Mills Co.

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tory role in the production of [Knight's] chronic obstructive pulmonary disease.

And, as discussed above, the deputy commissioner was free to interpret and believe Knight's testimony regarding the extent of his exposure. Nonetheless, we may not overrule the Commission's findings solely because there is evidence to the contrary.

## C

For the reasons stated in Part B, *supra*, we find no error in the Commission's finding that cotton dust exposure did not aggravate Knight's lung disease. Dr. Williams' report clearly indicated his opinion that Knight's *entire* lung problem could be accounted for by his cigarette smoking. He said, "It would not be necessary to invoke any other etiology to produce this degree of impairment." He stated it was not clear to him that cotton dust exposure "played any contributory role in [Knight's] impairment."

Again, Knight cites certain testimony of Dr. Kelling in an attempt to show that the exposure aggravated the lung disease. But this was not the only evidence in the case. It is the Commission's role to resolve conflicts in the evidence.

## III

[3] Knight's final argument is that the facts of this case raise the issue of estoppel and that, because compensation in this case may depend on estoppel, the Commission erred in failing to find facts on this issue. He argues that the Commission erred in suppressing evidence relevant to the estoppel issue and acted under a misapprehension of the law.

## A

The doctrine of estoppel may be applied in workers' compensation cases. *Godley v. County of Pitt*, 306 N.C. 357, 293 S.E. 2d 167 (1982). It has been applied to prevent an insurer from denying that an injured party was an employee within the terms of the insurance policy when premiums or other benefits had been accepted by the insurer. See, e.g., *Godley* (insurer accepted premiums); *Aldridge v. Foil Motor Company*, 262 N.C. 248, 136 S.E. 2d 591 (1964) (insurer accepted premiums); *Pearson v. Newt Pearson, Inc.*, 222 N.C. 69, 21 S.E. 2d 879 (1942) (accepted benefits of decedent's status as employee); *Garrett v. Garrett & Garrett*

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**Knight v. Cannon Mills Co.**

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*Farms*, 39 N.C. App. 210, 249 S.E. 2d 808 (1978) (insurer accepted premiums), *disc. rev. denied*, 296 N.C. 736, 254 S.E. 2d 178 (1979). It has also been applied to prevent an employer from pleading a time bar in defense of an action. *See, e.g., Belfield v. Weyerhaeuser Company*, 77 N.C. App. 332, 335 S.E. 2d 44 (1985).

The rationale for the application of estoppel in all of these cases is that it would be inequitable to allow a party to accept the benefits of a certain relationship or course of conduct and then later to deny the relationship or to maintain a position inconsistent with the previous course of conduct. *See Godley*. For example, it would be unfair to accept premiums and then deny coverage. And it would be inconsistent and unjust to induce an employee to delay the filing of a claim by telling him that it is unnecessary or that "he will be taken care of," thus lulling him into a sense of security, and then to attack the claim for untimeliness. *See Belfield*, 77 N.C. App. at 336-37, 335 S.E. 2d at 47 (quoting 3 A. Larson, *The Law of Workmen's Compensation*, Sec. 78.45, at 15-302 to -305 (1983)).

**B**

Knight contends that the facts in this case are sufficient to estop Cannon Mills to plead the two-year time bar in N.C. Gen. Stat. Sec. 97-58(c) (1985). He alleges that Cannon Mills knew his lung disease was caused by cotton dust as early as 1977 or 1978 because it had Dr. Kelling's diagnosis and report. This report said that exposure to dust would aggravate Knight's condition; that he would be transferred to a non-dust area; and that he should wear a respirator, see a doctor regularly, and quit smoking. Knight was transferred on 16 January 1978 to a non-dust area.

Knight also asserts that Cannon Mills paid his physician, hospital and drug bills from 27 September through 9 July 1984. He notes that Cannon Mills paid only those bills related to Knight's lung problems and that it paid them even after he stopped working. Some of the bills were apparently labeled as expenses incurred in connection with a program designed to identify people who may have occupational lung diseases, indicated by "severe respiratory problems." Some payments were stamped with directions to "notify workers' compensation" before any leave of absence or termination. Some contained the notation "workman's comp.," allegedly in Dr. Burkhardt's handwriting.



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**Knight v. Cannon Mills Co.**

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Knight contends that Cannon Mills failed (1) to notify the Industrial Commission that Knight had an occupational lung disease and (2) to obtain approval for the payment of Knight's medical bills, as it was required to do by N.C. Gen. Stat. Secs. 97-90 and -92 (1985). He also testified that Dr. Kelling's diagnosis was withheld from him until 1983.

Finally, Knight suggests that Dr. Burkhart perjured himself by giving sworn statements in answers to interrogatories that were inconsistent with his testimony before the Commission.

C

Before addressing the issue of estoppel, it is necessary to address some of Knight's allegations. First, the record, considered in context, does not conclusively show that Dr. Burkhart committed perjury. Dr. Burkhart stated that Cannon Mills had no notice of a "claim" of injury or occupational disease before the claim was actually filed in 1984. This is not in conflict with the fact that he knew of the 1977 diagnosis naming cotton dust as one of several possible causes of Knight's disease. Also, Dr. Burkhart gave a negative response to the specific question whether he had any agreement with Dr. Kelling or a certain clinic to withhold knowledge from Knight about his diagnosis. This is essentially consistent with Dr. Burkhart's explanation that the agreement was not to withhold information, but rather to channel it through Dr. Burkhart who would explain the testing and diagnosis to Knight. And finally, the apparent conflict between his statement that Cannon Mills had no agreement with drugstores to provide free drugs to Knight and his testimony that Cannon Mills paid for Knight's drugs since 1981 may be explained by his lack of knowledge of any formal agreement. Although the Commission had the discretion to find that these responses were less than candid, or wholly untruthful, we cannot say, on the record before us, that Dr. Burkhart committed perjury.

It is also important to note that, contrary to Knight's contention, the submission of forms to the Industrial Commission to notify it of an occupational injury or disease does not trigger a statutory process by which Knight would have received notice that his disease may be compensable. The statute requires an employer to report any injury by accident if it keeps the employee from work for more than one day. G.S. Sec. 97-92(a). Pre-

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**Knight v. Cannon Mills Co.**

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sumably this would include notice of an occupational disease, which is considered an injury by accident. *See* G.S. Sec. 97-52. But this notice requirement does not invoke the jurisdiction of the Commission without the employee filing a claim. *Perdue v. Daniel International, Inc.*, 59 N.C. App. 517, 296 S.E. 2d 845 (1982), *disc. rev. denied*, 307 N.C. 577, 299 S.E. 2d 647 (1983). Moreover, because the statute provides a penalty for failure to comply, *see* G.S. Sec. 97-92(e) (five to twenty-five dollar fine), and because the reports are kept private and used only for statistical purposes, an employer's failure to notify the Commission does not raise an estoppel claim. *Poythress v. J. P. Stevens and Company*, 54 N.C. App. 376, 385, 283 S.E. 2d 573, 579 (1981), *disc. rev. denied*, 305 N.C. 153, 289 S.E. 2d 380 (1982). Furthermore, if such a report may be used against the employer as a declaration against interest, *see Carlton v. Bernhardt-Seagle Company*, 210 N.C. 655, 188 S.E. 77 (1936), it would be unfair to require the filing of a damaging report when an employer does not believe a lung disease is an occupational disease.

For similar reasons, the failure to obtain approval for payments of medical expenses does not raise an estoppel claim. *See* G.S. Secs. 97-25, -59, -90; *Smith v. American & Efird Mills*, 305 N.C. 507, 290 S.E. 2d 634 (1982) (discussing the requirement of obtaining approval for medical payments). Even assuming prior approval is required when the disease is not clearly occupational, *see Matros v. Owens*, 229 N.C. 472, 50 S.E. 2d 509 (1948), the process of filing for approval does not result in notice to the claimant; the statute provides a penalty for noncompliance, *see* G.S. Sec. 97-90(b) (misdemeanor); and its purpose (to ensure that medical service providers are not overcharging for services and products) is unrelated to the employee's claim.

Finally, we address Knight's argument that the evidence suppressed by the Commission—the records of payments for physician, hospital and medical expenses—should have been allowed because it is relevant to estoppel. Knight argues that the payment of medical bills for a lung disease is inconsistent with the claim that the disease is not work-related. In *Biddex v. Rex Mills, Inc.*, 237 N.C. 660, 75 S.E. 2d 777 (1953), the Supreme Court considered whether to apply the doctrine of estoppel to prevent an employer from contesting liability because it had paid the employee's medical bills over an extended period of time under cir-

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**Knight v. Cannon Mills Co.**

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cumstances designed to lull the employee into a false sense of security. *See id.* at 662, 75 S.E. 2d at 779-80. The Court reasoned:

A commendably large number of our employers provide prompt medical examination, first aid, and hospital care for their employees in case of accident without regard to the nature of the injury, if any, that may result. Frequently, it is purely precautionary. When liability for the medical care of an employee who has suffered an accident is voluntarily incurred by the employer, the bills therefor must be approved by the Commission before the employer can demand reimbursement from its insurance carrier. In this manner such expenditures are kept within the schedule of fees and charges adopted by the Commission. G.S. 97-26.

This humanitarian conduct on the part of the employees of the State is permitted by the statute. And aside from any statutory provision on the subject, *we are committed to the view that such conduct cannot in any sense be deemed an admission of liability.*

*Id.* at 664, 75 S.E. 2d at 780-81 (citations omitted and emphasis added).

We recognize that, in the case at bar, Cannon Mills did not get the approval of the Commission for its payments. But, as discussed above, this requirement is enforced by statutory penalty; does not trigger any procedure helpful to Knight; and is designed to keep fees within the schedule, not to protect or to inform claimants.

D

Notwithstanding the assertion of facts inapplicable to the issue of estoppel, we agree that Knight has produced sufficient evidence to raise the issue of estoppel as it traditionally has been applied. Although there is no evidence that an agent for Cannon Mills made explicit statements designed to induce Knight to delay filing a claim, *see Belfield* (Defendant's agent specifically told claimant that she would take care of the paperwork in his case.), there is strong evidence that Cannon Mills knew of the possibility that Knight's lung disease was caused in part by exposure to cotton dust, and there is some evidence that Cannon Mills intentionally withheld this information from Knight. *See Dowdy v.*

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**Knight v. Cannon Mills Co.**

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*Fieldcrest Mills, Inc.*, 308 N.C. 701, 716, 304 S.E. 2d 215, 224 (1983).

Of course, there is competent evidence to suggest that Cannon Mills believed the lung disease was not caused by exposure to cotton dust. The diagnosis and the letter mentioned several other significant causes, and there was testimony indicating that the "workers' comp." stamp was used only to indicate the proper account to debit, not to suggest that the payments were for a compensable disease.

The resolution of this factual dispute was unnecessary because it was not relevant to compensation in this case. The Commission did not rely on the time bar defense to deny the claim. It based its decision to deny compensation on Knight's failure to present sufficient credible evidence of the extent of exposure to cotton dust and that the exposure caused or aggravated the lung disease. Without such evidence, the Commission found and concluded that the disease was caused by Knight's extensive smoking history and not by exposure to cotton dust.

Thus, although withholding knowledge may raise an estoppel claim, there was no error in this case. The Commission understood the law and reserved ruling on the estoppel evidence until it was necessary to address it.

**E**

At oral argument before this Court, counsel for Knight suggested that we extend the application of the estoppel doctrine to prevent Cannon Mills from denying (1) the extent of Knight's exposure and (2) that it caused the lung disease. This would, of course, prevent Cannon Mills from denying liability. In support of this argument, Knight suggests that Cannon Mills is using a secret, illegal fund to pay for medical expenses associated with its employees' lung diseases in order to avoid paying workers' compensation benefits. This is accomplished, according to Knight, by a widespread corporate conspiracy to suppress information from illiterates, to withhold information from the Commission, and to make illegal (unapproved) medical payments—and then to deny liability and plead the time bar.

We see no reason to extend the estoppel doctrine as Knight suggests. A defendant would not be able to plead the time bar on

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**Knight v. Cannon Mills Co.**

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the facts alleged by Knight because they tend to demonstrate conduct designed to delay the filing of a claim. As mentioned above, this is a logical application of estoppel: the reliance on the delay as a defense is inconsistent with the prior conduct intended to cause the delay. Knight argues that his well-documented bad memory, combined with Cannon Mills' suppression of knowledge, should be sufficient to estop the denial of exposure and causation because Knight would have remembered more if his claim were heard in 1978. But there is no reason to believe that Knight would have been a more credible witness or would have remembered the degree and duration of his exposure levels during the intermittent periods of his textile employment back to 1944. Moreover, the failure of proof on these issues was not based solely on the lack of credibility of Knight's testimony. The records offered by Knight were insufficient, and at least one independent expert medical witness believed Knight's smoking, rather than his exposure to cotton dust, was the probable cause of his lung disease. In any event, the remedy designed to protect plaintiffs from unfair delay is the application of estoppel to prevent a time bar defense. Moreover, we cannot extend the doctrine of estoppel to conflict with the law and policy of *Biddex*.

**IV**

For the reasons set forth above, the Opinion and Award of the Industrial Commission is

Affirmed.

Judges JOHNSON and COZORT concur.

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**Lowder v. All Star Mills, Inc.**

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MALCOLM M. LOWDER, MARK T. LOWDER AND DEAN A. LOWDER, PLAINTIFFS v. ALL STAR MILLS, INC., LOWDER FARMS, INC., CAROLINA FEED MILLS, INC., ALL STAR FOODS, INC., ALL STAR HATCHERIES, INC., ALL STAR INDUSTRIES, INC., TANGLEWOOD FARMS, INC., CONSOLIDATED INDUSTRIES, INC., AIRGLIDE, INC., AND W. HORACE LOWDER, DEFENDANTS, AND CYNTHIA E. LOWDER PECK, MICHAEL W. LOWDER, DOUGLAS E. LOWDER, LOIS L. HUDSON, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* FOR STEVE H. HUDSON, BRUCE E. HUDSON, BILLY J. HUDSON, ELLEN H. BALLARD, JENNEL H. RATTERREE, DAVID P. LOWDER, JUDITH R. LOWDER HARRELL, EMILY P. LOWDER CORNELIUS AND MYRON P. LOWDER, INTERVENING DEFENDANTS

No. 8620SC28

(Filed 19 August 1986)

**1. Receivers § 12.1— receivership fees and expenses—failure to allocate among corporations—order not final**

The trial court did not err in approving receivership fees and expenses of accountants, attorneys and receivers without allocating the various expenses among the seven corporate defendants in proportion to the services performed or expenses incurred on behalf of each corporation where the court's order is not a final judgment. When a final judgment is entered in the case, the total costs must be equitably apportioned among the defendant corporations.

**2. Attorneys at Law § 7.5; Corporations § 6— attorney fees—success in shareholder derivative action**

Plaintiffs were successful on the merits in part in the prosecution of a shareholder derivative action on behalf of a corporation so as to support an award of attorney fees under N.C.G.S. § 55-55(d), notwithstanding the jury found that the controlling director did not misappropriate a corporate opportunity, where the court made certain independent findings concerning the controlling director, the controlling director was removed, a receiver was appointed to protect the corporate assets, and the receiver and his attorney successfully negotiated with the IRS to reduce or eliminate tax claims against the corporation.

**3. Corporations § 6; Attorneys at Law § 7.5— shareholder derivative action—attorney fees—monetary benefit to corporation not required**

The statute allowing an award of attorney fees and expenses in a shareholder derivative action does not require that the fees and expenses be paid out of a monetary benefit received by the corporation as a result of the action. N.C.G.S. § 55-55(d).

**4. Corporations § 6; Attorneys at Law § 7.5— shareholder derivative action—attorney fees—insufficient findings**

The trial court's findings were insufficient to support amounts awarded as attorneys' fees in a shareholder derivative action where no findings were made indicating the number of hours reasonably expended; the nature or quality of

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**Lowder v. All Star Mills, Inc.**

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the work; the customary charge by other attorneys for similar services; the actual hourly rates used in arriving at the total fee award; whether this representation precluded opportunities to represent other clients; and whether the services were rendered on a contingency basis.

**5. Corporations § 6; Attorneys at Law § 7.5— shareholder derivative action—attorneys' fees—annual increase in hourly rate**

In awarding attorneys' fees under N.C.G.S. § 55-55(d) in a shareholder derivative action, the court does not abuse its discretion in approving a gradual, annual increase in each attorney's hourly rate to account for his or her increased experience and expertise, particularly in a case spanning several years.

**6. Corporations § 6; Attorneys at Law § 7.5— shareholder derivative action—attorneys' fees—variation in rates**

In awarding attorneys' fees in a shareholder derivative action, a variation in rates among attorneys who worked on different aspects of the representation may be justified by findings of fact explaining the difference in terms of complexity, attorney experience, relative success or the like.

**7. Corporations § 6; Attorneys at Law § 7.5— shareholder derivative action—attorneys' fees—merit bonus**

The trial court erred in adding a merit bonus of \$40,000 to the fees awarded to plaintiffs' attorneys in a shareholder derivative action. Even if the federal merit-bonus rule may be applied in this state, there was nothing in the record to show that this is a "rare case" warranting a merit bonus.

APPEAL by defendants Lowder Farms, Inc., All Star Foods, Inc., All Star Hatcheries, Inc., All Star Industries, Inc., and Consolidated Industries, Inc., and all intervening defendants from *Seay, Judge*. Judgment and Order entered 23 August 1985 in Superior Court, STANLY County. Heard in the Court of Appeals 15 May 1986.

*Moore, Van Allen, Allen & Thigpen, by Jeffrey J. Davis and Randel E. Phillips, for plaintiff appellees.*

*Kluttz, Hamlin, Reamer, Blankenship & Kluttz, by William C. Kluttz, Jr., for receiver appellees.*

*Boyce, Mitchell, Burns & Smith, P.A., by Lacy M. Presnell III and Susan K. Burkhart, for defendant appellants except All Star Mills, Inc.*

*Hopkins, Hopkins & Tucker, by William C. Tucker, for intervening-defendant appellants and defendant appellant All Star Mills, Inc.*

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Lowder v. All Star Mills, Inc.

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BECTION, Judge.

This appeal is from (1) an order approving payment of \$244,197.97 in fees and expenses to attorneys, accountants and receivers and (2) a judgment awarding \$300,308.93 in attorneys' fees under N.C. Gen. Stat. Sec. 55-55(d) (1982) all incurred in connection with a court-ordered receivership.

I

This is the fourth time in six years this case has been through the appellate process; the procedural history and factual background of this matter are documented in several reported decisions. See *Lowder v. All Star Mills, Inc.*, 75 N.C. App. 233, 330 S.E. 2d 649, *disc. rev. denied*, 314 N.C. 541, 335 S.E. 2d 19 (1985); *Lowder v. All Star Mills, Inc.*, 60 N.C. App. 699, 300 S.E. 2d 241, *disc. rev. denied*, 308 N.C. 387, 302 S.E. 2d 250 (1983); *Lowder v. All Star Mills, Inc.*, 60 N.C. App. 275, 300 S.E. 2d 230, *aff'd in part, rev'd in part*, 309 N.C. 695, 309 S.E. 2d 193 (1983); *Lowder v. All Star Mills, Inc.*, 45 N.C. App. 348, 263 S.E. 2d 624 (1980), *aff'd in part, rev'd in part*, 301 N.C. 561, 273 S.E. 2d 247 (1981).

Briefly, the case arose both as a derivative shareholder action brought by minority shareholders on behalf of All Star Mills, Inc. (Mills) and Lowder Farms, Inc. (Farms), and an individual action for damages and other relief. The suit alleged that Horace Lowder abused his authority as chief executive officer of defendant corporations and misappropriated corporate opportunities in a scheme involving several corporations owned by the Lowder family. Plaintiffs alleged and proved that Horace Lowder wrongfully diverted assets from two corporations, in which plaintiffs owned an interest, into five corporations established and primarily owned by Horace Lowder. Plaintiffs sought, among other things, liquidation and dissolution of Mills, Farms, and Consolidated Industries, Inc. (Consolidated).

After a jury trial in 1983, judgment was entered finding that Horace Lowder had misappropriated assets of All Star Foods, Inc. (Foods), All Star Hatcheries, Inc. (Hatcheries) and All Star Industries, Inc. (Industries). The assets of Foods, Hatcheries and Industries were impressed with a constructive trust in favor of Mills. After a non-jury trial in 1984, an order appointing temporary receivers for Mills and Farms, that had been issued in



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**Lowder v. All Star Mills, Inc.**

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February 1979 pending the outcome of trial, was made permanent. The court also ordered the liquidation and dissolution of Mills, Farms and Consolidated. These judgments were affirmed on appeal, 75 N.C. App. 233, 330 S.E. 2d 649, as was the award of counsel fees incurred by attorneys appointed to provide services to the receivers during the temporary receivership, 309 N.C. 695, 309 S.E. 2d 193.

The liquidation and dissolution of the defendant corporations in receivership is currently underway. During the several years of litigation, the trial court has approved the employment of, and payment of fees and expenses to, court-appointed receivers, attorneys and accountants covering specific periods of time and specific professional services. And although they have not yet been paid, judicial approval of the fees and expenses assures these parties that, ultimately, they will be fairly compensated for their years of service.

On 23 August 1985, the trial court issued an Order approving the receivers' petition for authorization to pay their accountants and attorneys whom the court had expressly authorized the receivers to employ. The fees were for services previously rendered and documented in connection with the operation of the corporate defendants in receivership. The receivers also requested authorization to obtain reimbursement for services they rendered on behalf of the corporate defendants. The court authorized and directed the corporate defendants to pay the receivers', accountants' and attorneys' fees, but it did not apportion the payment obligations among the defendants.

Also on 23 August 1985, the trial court entered a judgment awarding attorneys' fees and expenses under G.S. Sec. 55-55(d) for the successful prosecution of the derivative shareholder action. The court ordered Mills and Farms to reimburse plaintiff Malcolm Lowder for expenses incurred in litigating the derivative claim and ordered the same defendants to pay plaintiffs' attorneys' fees and expenses.

The defendants challenge the 23 August 1985 Order and Judgment. They contend that the trial court erred (1) in ordering payment of the fees and expenses of the receivers, accountants and attorneys because the court failed to equitably allocate these costs among the corporate defendants; (2) in awarding attorneys'

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**Lowder v. All Star Mills, Inc.**

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fees under G.S. Sec. 55-55(d) because the plaintiff shareholders were not "successful" in their derivative action against Farms and conferred no "substantial benefit" on this corporate defendant; (3) in awarding attorneys' fees without sufficient evidence or factual findings; and (4) in awarding a \$40,000 bonus to plaintiff's attorneys.

We affirm the trial court's order approving fees and expenses relating to the receivership. The award of fees under G.S. Sec. 55-55(d) is remanded for more detailed findings of fact and for the exclusion of the \$40,000 bonus.

## II

[1] Defendants' first argument is that the court failed to allocate the various expenses related to the receivership among the seven corporate defendants according to the proportion of services performed or expenses incurred on behalf of each corporation. We agree that when a *final* judgment is entered in this case, total costs must be equitably apportioned among the defendant corporations. *Lowder v. All Star Mills, Inc.*, 60 N.C. App. at 289, 300 S.E. 2d at 238. But the order appealed from is not the final judgment in this case. The receivership has been made permanent and other fees and expenses certainly will accrue. We find no error in the approval of the payments detailed in the Order. This assignment of error is overruled.

## III

[2] Defendants next contend that attorneys' fees cannot be awarded against Farms in this case because the derivative claims were wholly unsuccessful as to Farms. General Statute Section 55-55(d) provides in part:

If the action on behalf of the corporation is successful, in whole or in part, . . . the court may award the plaintiff the reasonable expenses of maintaining the action, including reasonable attorneys' fees.

Defendants argue that plaintiffs were "mere intermeddlers" who did not advance any corporate interest of Farms in the litigation.

First, the original complaint in this case alleged a multitude of wrongful acts by Horace Lowder against several corporate and individual defendants and sought several forms of relief. The fees

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**Lowder v. All Star Mills, Inc.**

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and expenses awarded under G.S. Sec. 55-55(d) must relate solely to the derivative action on behalf of corporate defendants Mills and Farms; it must not include fees and expenses incurred in connection with other parts of the proceedings, such as claims for liquidation and dissolution. See *Miller v. Ruth's of North Carolina, Inc.*, 68 N.C. App. 40, 313 S.E. 2d 849, *disc. rev. denied*, 311 N.C. 760, 321 S.E. 2d 140 (1984). The trial court specifically addressed this point in its judgment and provided that the award did not cover services rendered in the bankruptcy court, in representing the receivers, or in prosecuting the minority shareholders' action for liquidation and dissolution.

Defendants admit that plaintiffs were successful, at least in part, on the merits in their action on behalf of Mills. The jury returned a verdict finding that Horace Lowder had misappropriated corporate opportunities of Mills, and the court imposed constructive trusts in favor of Mills to enforce the return of its assets. But, defendants argue, because the jury found that Horace Lowder did not misappropriate a corporate opportunity of Farms, plaintiffs did not succeed on the merits as to Farms and cannot recover fees or expenses under G.S. Sec. 55-55(d).

Even though plaintiffs were not successful at trial on the specific issues submitted to the jury relating to Farms, plaintiffs were partially successful in their action on behalf of Farms. When the trial court received and adopted the findings of the jury, the court also made several specific "additional independent findings and conclusions" which the court found and concluded were "sufficient reasons to justify the relief requested by plaintiffs notwithstanding the presence or absence of the jury verdict." These included findings that (1) Horace Lowder was increasing his "exercise of complete control" over the companies; (2) he refused to allow plaintiff a position of more authority or participation in the companies; (3) he exhibited "an attitude of domination of the companies' affairs" by (a) his handling of tax claims against the companies without counsel, (b) his practice of management without consultation with other shareholders, (c) his control of other companies in which he had larger interests, and (d) his taking of treasury stock for himself without consultation with other stockholders; and (4) plaintiff was unlikely to "realize his reasonable expectations" regarding the affairs of the companies. The judgment

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**Lowder v. All Star Mills, Inc.**

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was explicitly tailored to redress these problems and to protect plaintiffs' interests, including their interest in Farms.

Furthermore, in the original complaint, plaintiffs specifically sought, among other things, to have Horace Lowder removed as director of Farms; to prevent Horace Lowder from attempting to defend Farms against Internal Revenue Service claims for a substantial amount of unpaid taxes plus penalties; and to have a permanent receiver appointed to protect the assets of Farms and properly defend the tax claims. The trial court found, and we agree, that plaintiffs were successful in pursuing these forms of relief.

Horace Lowder was removed. A temporary receiver was appointed, and later made permanent, to protect the assets of Farms. And the receiver and his attorneys succeeded in negotiating with the IRS to reduce or eliminate the tax claims against Farms. Moreover, these benefits obtained for Farms were defended successfully on two separate appeals. We conclude that plaintiffs were successful on the merits in part in the prosecution of their derivative claims on behalf of Farms, notwithstanding the jury verdict.

We decline to interpret "success on the merits" as narrowly as defendants do in this case. Defendants also urge us to adopt a new requirement—that the plaintiffs' action confer a "substantial benefit" on the corporation. Because we believe the removal of the self-dealing, controlling director from office and the appointment of a permanent receiver to protect the corporation in this case did confer a substantial benefit on Farms, we need not consider whether an award should fail for lack of such circumstances.

Finally, we reject defendants' contention that the award of \$60,061.78 in attorneys' fees against Farms is unconscionable because plaintiffs' attorneys originally accepted the case on a contingent fee basis. The record indicates that the contingent fee contract with plaintiffs' attorneys provided that any fees received by plaintiffs' counsel from any source would be credited against the twenty-five percent obligation in the contract. This is patently reasonable.

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Lowder v. All Star Mills, Inc.

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## IV

[3] Defendants argue that even if plaintiffs did succeed on the merits, the fee award under G.S. Sec. 55-55(d) must be reversed because the court failed to consider the proper factors to determine the award. First, defendants assert that there can be no fee award in the absence of a monetary benefit conferred on the corporation. Because the rationale for awarding fees under that statute is to allow the cost of the action to be paid out of the proceeds, defendants argue, the court must identify some financial benefit conferred on the corporation by the derivative action from which costs and fees may be awarded. Defendants point to the language in the statute requiring the court to "direct the plaintiff to account to the corporation for the remainder of any proceeds of the action."

Contrary to defendants' contention, the statute does not provide, directly or indirectly, that the award of fees and expenses cannot exceed the specific monetary recovery. The statute requires the plaintiffs to account to the corporation in the event there is a "remainder of any proceeds of the action," and clearly allows derivative actions for injunctive relief to prevent wrongful depletion of corporate assets. Many justifiable and successful actions will benefit a corporation over a long period of time—such as actions to enjoin gross mismanagement—and the benefit to the corporation may be difficult or impossible to quantify. The statute does not impose a requirement to quantify the financial success of the derivative claim before fees may be awarded. The plaintiff need only succeed, in whole or in part, on behalf of the corporation. Whether the expense incurred by plaintiffs in conferring a benefit on the corporation is excessive or unreasonable is a determination for the trial court to make in adjusting the award of costs and fees.

[4] We do find merit in defendants' argument that the court failed to include sufficient findings of fact to support the specific fee amounts awarded. The only findings of fact relevant to whether the attorneys' hours and rates were reasonable in this case were the findings that plaintiffs' attorneys were successful on behalf of Mills and Farms; that a bonus was justified, *see* Part V, *infra*; and the following:

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**Lowder v. All Star Mills, Inc.**

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4. Plaintiff Malcolm Lowder has incurred \$6,085.99 in reasonable expenses directly as the result of the prosecution of this action.

5. Plaintiffs' counsel, Moore, Van Allen, Allen & Thigpen, has provided legal services, and advanced expenses, in the prosecution of the derivative action on behalf of Plaintiffs which, at rates which are reasonable for cases such as this, aggregate to a total of \$260,308.93.

There are no findings indicating the number of hours reasonably expended; the nature or quality of the work; the customary charge (hours or rates) by other attorneys for similar services; the actual hourly rates used in arriving at the total fee award; whether this representation precluded opportunities to represent other clients; or whether the services were rendered on a contingency basis. The findings are deficient under *Owensby v. Owensby*, 312 N.C. 473, 322 S.E. 2d 772 (1984). Although our review of the record reveals that evidence for all or nearly all of these findings is readily available, an effective review of the trial court's exercise of discretion is not possible in this case. Therefore it must be remanded for more specific findings. *Owensby*.

[5, 6] Because certain additional issues raised in defendants' argument are likely to arise on remand, we address them here. First, we see no abuse of discretion in approving a gradual, annual increase in each attorney's hourly rate to account for his or her increased experience and expertise, particularly in a case such as this one spanning several years. Second, the variation in rates among attorneys who worked on different aspects of the representation may be justified by findings of fact explaining the difference in terms of complexity, attorney experience, relative success or the like. Indeed, it is by this variation, not bonuses, that attorneys may be rewarded for excellent service and perseverance through complex and lengthy proceedings.

Finally, we note that the court failed to support its determination that 80% of the attorneys' fees and expenses be paid by Mills and 20% by Farms. We realize it is difficult to justify any specific numerical division of this burden, and the difficulty inherent in this determination will be taken into account by the appellate courts if called upon to review the trial court's decision. But a more specific explanation for the unequal apportionment

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**Lowder v. All Star Mills, Inc.**

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must be offered than the general statement that the benefits obtained on behalf of each corporate defendant were disproportionate.

## V

[7] Defendants' final argument is that the \$40,000 merit bonus added by the court to the attorneys' fee award was improper. We agree.

The trial court found that the case was "bitterly contested, involving unique questions of law and . . . intense personal conflict. In addition, the matter has been quite protracted, through no fault of Plaintiffs or Plaintiffs' counsel." The court then, in its discretion, increased the award by \$40,000.

"Where attorneys' fees are properly awarded, the amount of the award rests within the discretion of the trial court and is reviewable on appeal only for an abuse of discretion." *Owensby*, 312 N.C. at 475, 322 S.E. 2d at 774 (citation omitted). An award of a merit bonus, based on factors that are properly considered in the initial determination of the hourly rates and the number of hours reasonably expended, is an abuse of discretion. *Coastal Productions Credit Association v. Goodson Farms, Inc.*, 70 N.C. App. 221, 319 S.E. 2d 650, *disc. rev. denied*, 312 N.C. 621, 323 S.E. 2d 922 (1984). In this State, the proper time to consider the many factors relevant in determining reasonable fees is in setting the attorneys' hourly rates. *Id.* These factors include the novelty and complexity of the issues involved; the magnitude of the task; and the nature, scope and quality of the legal services. *See Owensby; Coastal Productions.*

In *Coastal Productions*, this Court left open the question whether, in the "rare case," North Carolina trial courts may follow the federal rule and award a merit bonus when the attorneys show they have provided "superior quality representation and exceptional success. *See Blum v. Stenson*, --- U.S. ---, 79 L.Ed. 2d 891, 104 S.Ct. 1541 (1984)." 70 N.C. App. at 229, 319 S.E. 2d at 656.

Under the federal rule, most of the numerous considerations relating to the value of the legal services are subsumed within the calculation of the "lodestar" figure—the product of the reasonable hours and the hourly rates. *Pennsylvania v. Delaware*

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**Lowder v. All Star Mills, Inc.**

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*Valley Citizens' Council for Clean Air*, 54 U.S.L.W. 5017, 5022 (U.S. July 2, 1986). The Supreme Court's reasoning is persuasive:

[W]e specifically held in *Blum* that the "novelty [and] complexity of the issues," "the special skill and experience of counsel," the "quality of representation," and the "results obtained" from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award. *Id.*, at 898-900. Although upward adjustments of the lodestar figure are still permissible, *id.*, at 901, such modifications are proper only in certain "rare" and "exceptional" cases, supported by both "specific evidence" on the record and detailed findings by the lower courts. See *id.*, at 898-901.

A strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate—represents a "reasonable" fee is wholly consistent with the rationale behind the usual fee-shifting statute, including the one in the present case. These statutes were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws. . . .

Moreover, when an attorney first accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interests. Calculating the fee award in a manner that accounts for these factors, either in determining the reasonable number of hours expended on the litigation or in setting the reasonable hourly rate, thus adequately compensates the attorney, and leaves very little room for enhancing the award based on his post-engagement performance. In short, the lodestar figure includes most, if not all, of the relevant factors comprising a "reasonable" attorney's fee. . . .



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Howell v. Waters

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Furthermore, by limiting the number of points in the process of calculating a fee award at which a trial court may adjust the figures, in its discretion, to accurately reflect the value of services rendered, the appellate courts are better able to review the trial court's decisions.

Even assuming, as we did in *Coastal Productions*, that the federal merit-bonus rule may be applied in this State, there is nothing in the record, either in the evidence or in the court's findings, to show that this is a "rare case" warranting a merit bonus.

## VI

For the reasons set forth above, the Order approving payment of fees and expenses to receivers, attorneys and accountants is affirmed. The Judgment awarding attorneys' fees under G.S. Sec. 55-55(d) is remanded for the court (1) to make additional findings in accord with this opinion and (2) to exclude the \$40,000 merit bonus.

The Order of 23 August 1985 is affirmed.

The Judgment of 23 August 1985 is remanded.

Judges ARNOLD and WELLS concur.

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VERNON F. HOWELL v. DONALD RAY WATERS

No. 862SC66

(Filed 19 August 1986)

**1. Rules of Civil Procedure § 15.2— action for rescission on mutual mistake— evidence showed fraud— no implied consent to try fraud**

In an action arising from representations of defendant's agent in the sale of real estate, plaintiff's contention that the court erred by granting a directed verdict for defendant must be considered on the pleaded grounds of mutual mistake, even though the jury could have found fraud from the evidence, where the evidence which supported a claim for fraud was also relevant to the issue of mutual mistake and its admission therefore did not constitute implied consent to try the issue of fraud. N.C.G.S. § 1A-1, Rule 15(b).

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**Howell v. Waters**

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**2. Cancellation and Rescission of Instruments § 4— real estate—mistake as to boundary—directed verdict for defendant improper**

The trial court erred by allowing defendant's motion for a directed verdict in an action for rescission based on mutual mistake arising from defendant's agent's erroneous description of the boundaries of a tract of real property where the evidence, viewed in the light most favorable to plaintiff, would support a finding that at the time the contract was entered plaintiff was mistaken as to the boundaries and defendant's agent either had reason to know of plaintiff's mistake or caused the mistake, a jury could find that plaintiff's mistake as to the boundaries was a material mistake, and the contract did not allocate to plaintiff the risk of a mistake regarding the boundaries.

APPEAL by plaintiff from *Griffin, Judge*. Judgment entered 10 July 1985 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 15 May 1986.

On 27 July 1983 Jane Cole Leatherbee filed a civil action against plaintiff alleging that plaintiff wrongfully cut and removed timber from her land in Beaufort County, North Carolina. Plaintiff denied the allegations of Leatherbee's complaint and asserted ownership of the property. In addition plaintiff impleaded defendant. In his third party complaint plaintiff alleged that on 4 January 1979 defendant conveyed to him a certain tract of land in Beaufort County. Plaintiff further alleged that prior to the conveyance defendant's agent represented that the tract included the property to which Leatherbee asserts title and that plaintiff relied on the representations of defendant's agent in purchasing the tract from defendant and in removing the timber. Plaintiff sought indemnification for the wrongful removal of the timber and an abatement of the purchase price should it be determined that Leatherbee owns the disputed property. By an order entered 19 February 1985, Leatherbee was adjudged the owner of the land described in her complaint.

On 26 March 1984 plaintiff brought this action seeking to rescind the contract he entered with defendant. Plaintiff's complaint raised mutual mistake as the ground for rescission. The complaint reiterated the allegations of plaintiff's third party complaint and alleged further misrepresentations by defendant's agent as to the true boundary lines.

The two actions were consolidated for trial. At the close of the evidence presented by Leatherbee and plaintiff, Leatherbee and defendant moved for a directed verdict. The court allowed

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**Howell v. Waters**

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their motions and directed a verdict for Leatherbee in her action against plaintiff for wrongful removal of the timber and for defendant in plaintiff's action for rescission or, in the alternative, abatement of the purchase price based upon plaintiff's and defendant's mutual mistake as to the boundaries of the land purchased by plaintiff.

From a judgment dismissing plaintiff's claims against defendant, plaintiff appeals.

*Pritchett, Cooke & Burch, by Stephen R. Burch and W. W. Pritchett, for plaintiff appellant.*

*John A. Wilkinson for defendant appellee.*

WHICHARD, Judge.

Plaintiff contends the court erred by granting defendant's motion for a directed verdict "in view of plaintiff's evidence that Defendant's agent misrepresented the boundary lines of the tract of land which plaintiff purchased." In ruling on a motion for a directed verdict the court must view the evidence in the light most favorable to the nonmoving party. *Husketh v. Convenient Systems*, 295 N.C. 459, 461, 245 S.E. 2d 507, 508-09 (1978). The motion should be granted only if the evidence is insufficient, as a matter of law, to support a verdict for the nonmoving party. *Id.*

The evidence, viewed in the light most favorable to plaintiff, can be summarized as follows:

On 4 January 1979 plaintiff purchased a tract of land from defendant. Plaintiff negotiated the terms of the purchase with Herbert Hoell, defendant's agent.

In September 1978 Hoell and plaintiff viewed the property. Hoell described the boundaries of the property to plaintiff as follows: the southern boundary of the property is canal No. 10; the eastern boundary is the Broadcreek Outfall canal; the northern boundary is canal No. 9; and the western boundary abuts Mr. Myers' property. Plaintiff assumed that Hoell's description of the boundaries was complete and accurate and relied on his description in having the timber appraised prior to purchasing the property.

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Howell v. Waters

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While portions of the southern, eastern and northern boundaries of the property conveyed are canal No. 10, the Broadcreek Outfall canal, and canal No. 9, respectively, a portion of the southern boundary lies north of canal No. 10, a portion of the eastern boundary lies west of the Broadcreek Outfall canal, and a portion of the northern boundary lies south of canal No. 9. The boundaries of the property conveyed deviate from Hoell's incomplete representation of the boundaries so as to exclude at least 125 acres. The contract pursuant to which the property was conveyed described the property as follows: "that plot, piece or parcel of land . . . in the county of Beaufort, State of N.C., being known as and more particularly described as . . . 484 AC. in Pantego Twnsp. owned by [defendant]."

Hoell testified for plaintiff and admitted that he had represented to plaintiff "in a very general manner" that the southern boundary of the property was canal No. 10, the eastern boundary was the Broadcreek Outfall canal and the northern boundary was canal No. 9. Prior to making these representations, Hoell had been given a freehand sketch of the property by defendant. The sketch correctly depicted the boundaries of the property conveyed. Hoell testified that he "did not tell [plaintiff] that [he] knew where all of the boundaries of the tract were, and [he] did not know where they were."

[1] Plaintiff has denominated his claim as one based on "mutual mistake." However, the evidence would support an action for rescission of the contract based on fraud. The essential elements of fraud are as follows:

"(1) That defendant made a representation relating to some material past or existing fact; (2) that the representation was false; (3) that when he made it, defendant knew that the representation was false, *or made it recklessly, without any knowledge of its truth and as a positive assertion*; (4) that defendant made the representation with intention that it should be acted upon by plaintiff; (5) that plaintiff reasonably relied upon the representation and acted upon it; and (6) that plaintiff thereby suffered injury." [Emphasis supplied.]

*Lamm v. Crumpler*, 240 N.C. 35, 44, 81 S.E. 2d 138, 145 (1954), quoting *Cofield v. Griffin*, 238 N.C. 377, 379, 78 S.E. 2d 131, 133 (1953); see also *Hinson v. Hinson*, 80 N.C. App. 561, 574-75, 343

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Howell v. Waters

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S.E. 2d 266, 274 (1986). Hoell's representation regarding the boundaries of the property related to a material existing fact, and while portions of the boundaries were as Hoell represented, a jury could find that his incomplete description amounted to a false representation. Prior to showing the property to plaintiff, Hoell had been given a sketch which accurately depicted the boundary lines. Hoell testified regarding his knowledge of the boundaries at that time: "I did not tell [plaintiff] that I knew where all the boundaries of the tract were, and I did not know where they were. I would have furnished more detailed information if [plaintiff] had asked for it." Based on the foregoing a jury could find that Hoell's description of the boundaries was made recklessly, without regard to the truth or falsity of the representation. Further, given the relative positions of plaintiff and Hoell—a potential purchaser viewing the property and an agent of the owner giving a tour of the property—a jury could find that Hoell's description of the boundaries was made as a positive assertion with the intent that it should be acted upon by plaintiff, and that plaintiff reasonably relied upon the representation. As Hoell's principal, defendant is liable for Hoell's representations to the same extent as if he had made them himself. *MacKay v. McIntosh*, 270 N.C. 69, 72-73, 153 S.E. 2d 800, 803 (1967).

Plaintiff, however, did not plead fraud. In his answer defendant stated: "In the instant action, [plaintiff] abandons the theory of a misrepresentation and bases his claim upon the allegation of *Mutual Mistake* . . . ." The record does not reveal an attempt by plaintiff to assert fraud as a ground for rescission of the contract subsequent to the pleading stage, and although the majority of the cases cited in plaintiff's brief are fraud cases, plaintiff's attorney expressly stated in oral argument that plaintiff was not attempting to assert a claim based on fraud.

"In passing upon a trial judge's ruling as to a directed verdict, we cannot review the case as the parties might have tried it; rather, we must review the case as tried below, as reflected in the record on appeal." *Tallent v. Blake*, 57 N.C. App. 249, 252, 291 S.E. 2d 336, 339 (1982). We are mindful that N.C. Gen. Stat. 1A-1, Rule 15(b) provides: "When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." The evidence which supports a claim for fraud was

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**Howell v. Waters**

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also relevant to the issue of mutual mistake raised in plaintiff's complaint and, as such, its admission does not constitute "implied consent" to try the issue of fraud. *Gilbert v. Thomas*, 64 N.C. App. 582, 585, 307 S.E. 2d 853, 855-56 (1983) ("When, however, the evidence used to support the new issue would also be relevant to support the issue raised by the pleadings, the defendant has not been put on notice of plaintiff's new or alternate theory. Therefore, defendant's failure to object does not constitute 'implied consent.'"); see also *Munchak Corp. v. Caldwell*, 37 N.C. App. 240, 246 S.E. 2d 13 (1978). Accordingly, if plaintiff is to prevail on his contention that the court erred in granting defendant's motion for a directed verdict, he must do so on the pleaded ground of mutual mistake.

[2] Under certain circumstances a contract for the sale of real estate may be rescinded on the basis of mutual mistake of fact. See, e.g., *MacKay v. McIntosh*, 270 N.C. 69, 153 S.E. 2d 800 (1967). In *MacKay* the Court rescinded an executory real estate contract when the parties, at the time of execution, shared the mistaken belief that "the subject property was within the boundaries of an area zoned for business." *MacKay*, 270 N.C. at 73-74, 153 S.E. 2d at 804. The Court reasoned:

"The formation of a binding contract may be affected by a mistake. Thus, a contract may be avoided on the ground of mutual mistake of fact where the mistake is common to both parties and by reason of it each has done what neither intended. Furthermore, a defense may be asserted when there is a mutual mistake of the parties as to the subject matter, the price, or the terms, going to show the want of a consensus *ad idem*. Generally speaking, however, in order to affect the binding force of a contract, the mistake must be of an existing or past fact which is material; it must be as to a fact which enters into and forms the basis of the contract, or in other words it must be of the essence of the agreement, the *sine qua non*, or, as is sometimes said, the efficient cause of the agreement, and must be such that it animates and controls the conduct of the parties." 17 Am. Jur. 2d, Contracts Sec. 143.

In our opinion, and we so hold, whether the subject property was within the boundaries of an area zoned for business

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Howell v. Waters

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is a factual matter; and, under the evidence, the mutual mistake as to this fact related to the essence of the agreement.

*Id.* at 73-74, 153 S.E. 2d at 804.

In *Financial Services v. Capitol Funds*, 288 N.C. 122, 217 S.E. 2d 551 (1975), the Court qualified the requirement that a mistake be mutual as follows:

In order for the remedy of rescission to be operable because of mistake of fact, there must be mutual mistake of fact. A unilateral mistake, unaccompanied by fraud, imposition, undue influence, or like oppressive circumstances, is not sufficient to avoid a contract or conveyance. *Tarlton v. Keith*, 250 N.C. 298, 108 S.E. 2d 621; *Cheek v. R.R.*, 214 N.C. 152, 198 S.E. 626. The following pertinent statement aptly summarizes the requirement of mutuality:

. . . It is said that ordinarily a mistake, in order to furnish ground for equitable relief, must be mutual; and as a general rule relief will be denied where the party against whom it is sought *was ignorant that the other party was acting under a mistake and the former's conduct in no way contributed thereto*, and a fortiori this is true where the mistake is due to the negligence of the complainant. . . . [Emphasis supplied.]

77 Am. Jur. 2d *Vendor and Purchaser* Sec. 51 at 237.

*Financial Services*, 288 N.C. at 136, 217 S.E. 2d at 560; *see also Blankenship v. Price*, 27 N.C. App. 20, 22, 217 S.E. 2d 709, 710 (1975) ("In general, a unilateral mistake in the making of an agreement, of which the other party is ignorant and to which he in no way contributes, will not afford grounds for avoidance of the agreement.").

Thus, while it has been stated that there can be no relief from a unilateral mistake, *see, e.g., Tarlton v. Keith*, 250 N.C. 298, 305, 108 S.E. 2d 621, 625, the requirement that the mistake be mutual is not without exceptions. *See Financial Services, supra; Blankenship, supra. See also Restatement (Second) of Contracts* Sec. 153 (1979); D. Dobbs, *Remedies* Sec. 11.4 (1973). The mistake of one party is sufficient to avoid a contract when the

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Howell v. Waters

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other party had reason to know of the mistake or caused the mistake. *Restatement (Second) of Contracts* Sec. 153 (1979).

The evidence, viewed in the light most favorable to plaintiff, would support a finding that at the time the contract was entered plaintiff was mistaken as to the boundaries and Hoell, defendant's agent, either had reason to know of plaintiff's mistake or caused the mistake. Further, the boundaries of the property conveyed deviated from those described by Hoell so as to exclude at least 125 acres from the tract plaintiff intended to purchase. A jury thus could find that plaintiff's mistake as to the boundaries was a material mistake—one "which enters into and forms the basis of the contract . . . or, as is sometimes said, the efficient cause of the agreement . . . such that it animates and controls the conduct of the parties." *MacKay, supra*.

Defendant maintains that because the deed accurately described the property which he intended to convey, plaintiff should be denied relief. Defendant's contention presents two principles of law which constitute defenses to plaintiff's action: (1) the statute of limitations in actions based on mistake is three years, N.C. Gen. Stat. 1-52(9), and the limitation period "begins to run from the time the mistake is discovered or *should have been discovered*," *Huss v. Huss*, 31 N.C. App. 463, 467, 230 S.E. 2d 159, 163 (1976); and (2) the party who assumes the risk of mistake regarding certain facts may not seek to rescind a contract merely because the facts were not as he had hoped. *Financial Services*, 288 N.C. at 139, 217 S.E. 2d at 562; *Restatement (Second) Contracts* Secs. 153-54 (1979); D. Dobbs, *Remedies* Sec. 11.2 at 719, Sec. 11.3 at 735.

A party has assumed the risk of a mistake when

(a) the risk is allocated to him by agreement of the parties, or

(b) he is aware, at the time the contract is made that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or

(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

*Restatement (Second) Contracts* Sec. 154 (1979).



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Howell v. Waters

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The contract here did not allocate to plaintiff the risk of a mistake regarding the boundaries. See *Restatement (Second) Contracts* Sec. 154(a) (1979). Considering the nature and location of the land and the extreme generality of the description in the contract, together with the fact that the vendor's agent made positive assertions regarding the boundaries, it was not reasonable for the court to allocate the risk of mistake as to the boundaries to the purchaser as a matter of law. See *Restatement (Second) Contracts* Sec. 154(c) (1979); *Fox v. Southern Appliances*, 264 N.C. 267, 271-72, 141 S.E. 2d 522, 526 (1965) (reference to *Whitaker v. Wood*, 258 N.C. 524, 128 S.E. 2d 753, as "a case involving misrepresentations as to matters of record in the sale of land . . . in which it was held that the question whether plaintiffs might reasonably rely on seller's representations was for the jury"); *Keither v. Wilder*, 241 N.C. 672, 675-76, 86 S.E. 2d 444, 446-47 (1955); *NCNB v. Carter*, 71 N.C. App. 118, 123, 322 S.E. 2d 180, 184 (1984) ("Generally, the buyer . . . has the right to rely on the boundary representations made by the seller when the seller purports to know them."). But cf. *Breece v. Standard Oil Co.*, 209 N.C. 527, 184 S.E. 86 (1936); *Dorrity v. Bldg. & Loan Ass'n*, 204 N.C. 698, 169 S.E. 640 (1933). Whether plaintiff assumed the risk of a mistake by entering into the contract aware that his knowledge regarding the boundaries was limited is in essence a question of whether plaintiff reasonably interpreted Hoell's representation as a complete description of the boundaries. See *Restatement (Second) Contracts* Sec. 154(c); D. Dobbs, *Remedies* Sec. 11.2 at 719 ("One who knows he is uncertain assumes the risk that the facts will turn out unfavorably to his interests."). Whether plaintiff failed to exercise due diligence in discovering his mistake, N.C. Gen. Stat. 1-52(9), or whether he assumed the risk of a mistake regarding the boundaries of the property, *Financial Services*, *supra*, are questions of fact to be determined by a jury. *Whitaker v. Wood*, 258 N.C. 524, 128 S.E. 2d 753 (1963); *NCNB*, 71 N.C. App. at 123-24, 322 S.E. 2d at 184; *Huss*, 31 N.C. App. at 468, 230 S.E. 2d at 163.

While based on plaintiff's evidence a jury could find a mistake justifying rescission, recent Supreme Court decisions have raised questions regarding application of the doctrine of mutual mistake to executed real estate contracts. In *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E. 2d 102 (1975), our Supreme Court

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Howell v. Waters

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expressly refused to apply the mutual mistake of fact theory to an executed, as opposed to executory, real estate sale contract. *Hinson*, 287 N.C. at 432-33, 215 S.E. 2d at 109-10. The parties there mistakenly assumed the subject property could support an on-site sewage disposal system and thus be suitable for a residence. *Id.* Assuming, *arguendo*, that the facts gave rise to a "true mistake case," the court concluded that it "must necessarily involve a mistaken *assumption* of the parties in the formation of the contract of purchase." *Hinson*, 287 N.C. at 430, 215 S.E. 2d at 107. The Court went on to define a mistaken assumption case as one in which "the parties communicate their desires to each other perfectly; the intent to complete a sale, or a contract of sale, and their objective acts are in accord with their intent." *Id.* After noting the unsettled nature of the law of mistake as applied to mistaken assumption cases, the court rejected the theory of mutual mistake as a basis for plaintiff's rescission. It explained:

[B]ecause of the uncertainty surrounding the law of mistake we are extremely hesitant to apply this theory to a case involving the completed sale and transfer of real property. *Its application to this type of factual situation* might well create an unwarranted instability with respect to North Carolina real estate transactions and lead to the filing of many non-meritorious actions. Hence, we expressly reject this theory as a basis for plaintiff's rescission. [Emphasis supplied.]

*Id.* at 432-33, 215 S.E. 2d at 109.

In *Financial Services v. Capitol Funds*, 288 N.C. 122, 217 S.E. 2d 551 (1975), which closely followed *Hinson*, the Court held that an executed real estate contract was not subject to rescission for mutual mistake of fact where the purchaser mistakenly assumed that an effective driveway permit for the subject property had been obtained by the assignor of an option to purchase the property. However, the Court stated:

Although this Court will readily grant equitable relief in the nature of reformation or rescission on grounds of mutual mistake when the circumstances justify such relief, we jealously guard the stability of real estate transactions and require clear and convincing proof to support the granting of this equitable relief in cases involving *executed* conveyances of land. [Emphasis supplied.]

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Howell v. Waters

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*Id.* at 139, 217 S.E. 2d at 562. Thus, without detailing the circumstances under which a mutual mistake will justify rescission of an executed real estate contract, the Court acknowledged that certain circumstances will warrant equitable relief from an executed contract for the sale of realty on the ground of mutual mistake.

The mistakes from which plaintiffs sought relief in *Hinson* and *Financial Services* were mistaken assumptions; neither mistake was the result of a misrepresentation, as here. *Hinson*, 287 N.C. at 430, 215 S.E. 2d at 107 ("Assuming, *arguendo*, . . . that this is a true mistake case, then it is one that must necessarily involve a mistaken *assumption* of the parties in the formation of the contract of purchase. In these mistaken assumption cases, unlike other kinds of mistake cases, the parties communicate their desires to each other perfectly . . . ."); *Financial Services*, 288 N.C. at 137, 217 S.E. 2d at 551 ("[W]e assume, without deciding, that plaintiff has established the purchase of the subject property under a mistaken assumption that an effective driveway permit had been obtained . . . and that plaintiff would not have purchased the property without such permit. Even so, there is a complete absence of evidence tending to show that this mistaken assumption was induced by any misrepresentation, deceitful action, or misleading silence on the part of [defendant]."). We find this distinction dispositive. The Court implied in *Financial Services*, 288 N.C. at 139, 217 S.E. 2d at 562, that certain mistakes will justify the rescission of an executed real estate contract; a mistake induced by a misrepresentation is as persuasive a case for rescission as any. See *Hice v. HiMil, Inc.*, 301 N.C. 647, 273 S.E. 2d 268 (1980) (allowing reformation of a deed executed seven years prior to plaintiff's action); D. Dobbs, *Remedies* Sec. 11.3 at 733 ("Probably courts are more willing to grant rescission for mistake induced by innocent misstatement than for mistake in unspoken assumptions not so induced.").

We thus conclude that the court erred in allowing defendant's motion for a directed verdict. The following questions of fact should have been answered by the jury:

(1) Did plaintiff exercise due diligence in discovering the alleged mistake such that his action is not barred by the three year statute of limitations in N.C. Gen. Stat. 1-52(9)?;

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**In re Appeal of Duke Power Co.**

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(2) Has plaintiff presented clear, cogent and convincing evidence establishing that he was mistaken regarding the boundaries of the property to be conveyed?;

(3) If plaintiff was mistaken, did defendant or defendant's agent have reason to know of plaintiff's mistake or cause plaintiff's mistake?;

(4) Was the mistake material?; and

(5) Did plaintiff assume the risk of a mistake by:

(a) unreasonably relying on Hoell's representations or

(b) treating his limited knowledge of the boundaries of the property to be conveyed as sufficient?

Should the jury answer the first four questions affirmatively and the fifth negatively, plaintiff is entitled to rescission of the contract.

**Reversed and remanded.**

**Judges WEBB and JOHNSON concur.**

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IN THE MATTER OF: THE APPEAL OF DUKE POWER COMPANY FROM THE LEVEL OF APPRAISAL OF ITS PROPERTY IN COMPARISON WITH THE LEVEL OF APPRAISAL OF LOCALLY APPRAISED PROPERTY IN GUILFORD COUNTY FOR 1983

No. 8510PTC1359

(Filed 19 August 1986)

**Taxation § 25.4— ad valorem taxes—public service company—inequitable difference in valuation**

By introducing a sales/assessment ratio study showing that Guilford County appraised locally assessed real property at 80.12% of true market value for 1983, a power company established a *prima facie* case of "inequitable difference" under N.C.G.S. § 105-342(c) between the level of assessment of locally appraised property in Guilford County and the level of the 1983 assessment of the power company's property in Guilford County at 100% of fair market value by the Department of Revenue, and the burden shifted to Guilford County to rebut the power company's evidence as to real property and to come forward with evidence as to the assessment levels for personal property.

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**In re Appeal of Duke Power Co.**

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APPEAL by petitioner from the Final Decision of the North Carolina Property Tax Commission entered 6 September 1985. Heard in the Court of Appeals 13 June 1986.

Duke Power Company (Duke) is a public service company as defined in G.S. 105-333(14). Its property is subject to annual appraisal, apportionment and allocation under the provisions of G.S. 105-335 through -338.

Pursuant to G.S. 105-342(c) Duke petitioned the Guilford County Board of Commissioners for a 19.88 percent reduction in the tax assessment of Duke system property allocated to Guilford County for 1983 contending there was "inequitable difference" between the level of assessment of its system property and the level of assessment of locally appraised property in Guilford County. Duke's petition was accompanied by a sales/assessment ratio study showing real estate assessments in Guilford County at 80.12 percent of fair market value. According to statute, G.S. 105-342(c)(4)-(5), a determination that Guilford County assessed the property of other taxpayers at 85 percent of fair market value or less constitutes an "inequitable difference" entitling Duke to a reduction in the assessment of its property allocated to Guilford County to the level found to exist in Guilford County. Guilford denied Duke's request and Duke appealed to the Property Tax Commission which heard the matter in April and September of 1984.

At the first hearing before the Property Tax Commission in April 1984, Duke presented evidence through several expert witnesses, including Dr. A. R. Manson, Dr. Richard Netzer and Mr. Gerald Searle, and two other witnesses, Mr. Curtis West and Mr. Jim Murphy. That evidence included extensive written reports by each expert to the effect that the combined level of assessment of real and personal property by Guilford County was less than 82 percent of fair market value, and testimony by Murphy that 95 percent of Duke's system property in Guilford County was real property and 5 percent personal property.

Guilford County responded through exhibits and testimony from tax department employees, one of whom was Brice A. Wellmon, certified assessment evaluator, who testified that under his direction and supervision Guilford County conducted a similar study of real property which showed that locally assessed real property in Guilford County to be 83.00 percent of fair market

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**In re Appeal of Duke Power Co.**

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value. In addition, Guilford County contended that personal property (with the exception of household personalty) was assessed at 100 percent of fair market value.

At the conclusion of the first hearing Duke requested the Commission to issue a subpoena to Guilford County for the tax records for 1982-84. This request was made to enable Dr. Manson to complete a sales/assessment ratio study of locally assessed personal property. The Commission issued the subpoena but only for assessment data for the tax year 1983. After that information was obtained, a second hearing was held in September 1984 for the purpose of receiving that study and the evidence concerning it.

At the second hearing Dr. Manson and Mr. West again testified in Duke's behalf, in support of their personal property study which showed that the assessment level of property in Guilford County was 85.82 percent for business motor vehicles and 91.18 percent for machinery and equipment. Guilford responded through Mr. Roger C. Cotten, tax department director, who testified about the validity of Guilford's personal property assessment procedures and that personalty was assessed at 100 percent.

Pursuant to G.S. 105-342(d) the Commission made findings of fact and conclusions of law and issued an order denying Duke's petition for a reduction in the assessment of Duke's system property in Guilford County. The Commission found that Guilford County had assessed local property at 85.19 percent of its fair market value. The Commission accepted Dr. Manson's sales/assessment ratio study of Guilford's real property at 80.12 percent of its fair market value. As to personal property the Commission found that machinery and equipment, business motor vehicles, inventory, farm machinery, and livestock were all assessed at 100 percent of their fair market values and that household personal property was assessed at 80.12 percent of fair market value, the same level as realty.

In its consideration of all the evidence presented, the Commission concluded that "the evidence presented by the appellant [Duke] is insufficient to carry the burden of showing that, with the exception of household personal property, the county [Guilford] has failed to assess personal property at market value as defined in G.S. 105-283."

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**In re Appeal of Duke Power Co.**

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The following table from the Commission's order sets forth the Commission's findings:

| <u>PROPERTY TYPE</u>                 | <u>ASSESSED VALUE</u>            | <u>RATIO</u> | <u>MARKET VALUE</u>  |
|--------------------------------------|----------------------------------|--------------|----------------------|
| Inventory                            | \$ 1,069,433,865                 | 1.00         | \$ 1,069,433,865     |
| Machinery & Equip.<br>& Furn. & Fix. | 879,367,843                      | 1.00         | 879,367,843          |
| Motor Vehicles                       | 789,659,796                      | 1.00         | 789,659,796          |
| Farm Machinery<br>& Livestock        | 15,428,916                       | 1.00         | 15,428,916           |
| Household Personal<br>Property       | 157,082,621                      | .8012        | 196,059,187          |
| Real Estate                          | <u>6,288,766,981</u>             | <u>.8012</u> | <u>7,849,184,948</u> |
|                                      | \$ 9,199,740,022                 |              | \$10,799,134,556     |
|                                      | <u>\$ 9,199,740,022</u> = 85.19% |              |                      |
|                                      | \$10,799,134,556                 |              |                      |

The assessed values in the Commission's order and in the table are those provided by Guilford. The ratios are derived by dividing each category of assessed value by the appropriate market value for that category.

From the final decision of the Property Tax Commission denying its petition for a reduction in the assessment of its system property, Duke Power Company appeals.

*Robinson, Bradshaw & Hinson, by Robert W. Bradshaw, Jr., Richard A. Vinroot and Thomas B. Griffith for petitioner-appellant.*

*W. B. Trevorrow for respondent-appellee, Guilford County.*

EAGLES, Judge.

By its first assignment of error Duke contends that the Property Tax Commission committed reversible error by failing to shift the burden of proof to Guilford County after Duke introduced competent, material and substantial evidence of an inequitable difference between the level of assessment of Duke's system property and the level of assessment of the property of other Guilford County taxpayers. We agree.

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**In re Appeal of Duke Power Co.**

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At the first hearing before the Property Tax Commission in April, 1984, Duke presented evidence through its expert witness, Dr. Manson, and his real property sales/assessment ratio study to the effect that Guilford County had assessed real property at 80.12 percent of fair market value on 1 January 1983. Duke then made a motion that the Commission shift the burden of proof to Guilford County with regard to both real and personal property. Duke contended that its showing of an inequitable difference with respect to real property rebutted any presumption of correctness afforded to the county's appraisal and tax procedures. The Commission denied the motion and Duke proceeded to introduce additional evidence that Guilford County had assessed both real and personal property at less than 85 percent.

It is a well settled principle of law in this State that ad valorem tax assessments are presumed correct. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E. 2d 752 (1975). However, this presumption of correctness is only one of fact and therefore, it is rebuttable. *Id.*

In this State all tangible property (both real and personal) subject to ad valorem taxation must be appraised and assessed at its true value (market value) in money. G.S. 105-283 and 105-284. The property of "public service companies" (defined in G.S. 105-333(14) to include electric power companies) is centrally assessed for ad valorem tax purposes by the North Carolina Department of Revenue. G.S. 105-288. The department annually values the public service companies' system property in accordance with G.S. 105-335(b)(1) and allocates the valuations of that property among the ad valorem taxing jurisdictions in this State. G.S. 105-338 and 105-341. All real and personal property subject to ad valorem taxation other than public service company property is appraised and assessed locally by each county. Locally assessed real property is reappraised for assessment purposes every eight years, while locally assessed personal property is reappraised annually. G.S. 105-285 through -287. As a result of this statutory scheme and the effects of inflation and appreciation, the ratio of assessed value of locally assessed real property to its true market value diminishes during each eight-year period until at reappraisal the ratio is restored to 100 percent. In contrast, public service companies' system property (both real and personal) is maintained through annual reappraisal at 100 percent every year.



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In re Appeal of Duke Power Co.

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In order to ameliorate this statutorily created inequity as to the appraisal of real property, our legislature enacted G.S. 105-342(c) which provides in pertinent part that:

(1) In the year in which a general reappraisal of real property is required to be conducted in a county under the provisions of G.S. 105-286(a), and in the third and seventh years following the effective date of a county's last general reappraisal of real property, any public service company whose property is subject to appraisal under this Article may petition the board of county commissioners in writing for a reduction in the assessment of the public service company's property by the county on the ground that there exists an inequitable difference between the level of assessment of locally appraised property and that of the public service company's property by the Department of Revenue. The request for reduction shall be filed with the board of commissioners not later than April 1 of the year for which it is made. The request shall set forth with particularity the alleged inequitable difference in levels of appraisal and shall include any sales/assessment ratio studies or other appraisal information which the public service company desires to be considered by the board of commissioners. . . .

The quoted language, part of G.S. 105-342(c), was repealed by Session Laws 1985, c. 601, ss. 4 and 5 effective 1 January 1987 but applies here.

An "inequitable difference" is defined as a difference in the level of appraisals of fifteen percent or more. G.S. 105-342(c)(4). The parties here stipulated that in 1983 Duke's system property was assessed at 100 percent of fair market value. Duke contends that by introducing evidence that locally assessed real property in Guilford County was appraised, as of 1 January 1983, at 80.12 percent of fair market value, the burden of proof should shift to Guilford County to establish the level at which Guilford appraises both locally assessed real and personal property. We agree.

Duke relies primarily on *Clinchfield Railroad Company v. Lynch*, 700 F. 2d 126 (4th Cir. 1983) (*Clinchfield I*) and *Clinchfield Railroad Company v. Lynch*, 784 F. 2d 545 (4th Cir. 1986) (*Clinchfield II*). We believe that the logic of these cases should control here. In *Clinchfield I* railroads operating in North Carolina

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In re Appeal of Duke Power Co.

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brought suit against various state officials and counties alleging discriminatory taxation of real and personal property in violation of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"), 49 U.S.C. Section 11503. The 4-R Act was enacted to eliminate property tax discrimination by the states against the railroads. Section 306 is directed at both real and personal property taxation and prescribes certain remedies to correct inequities in both categories. Section 306 requires that assessments imposed on railroad property be compared with assessments imposed on other commercial or industrial property.

In answering the questions before it, the court in *Clinchfield I* considered where the burden of proof should fall once the taxpayer demonstrates by a sales/assessment ratio study that discriminatory treatment existed with respect to real property.

We are satisfied that once North Carolina was shown to have practiced discrimination with regard to real property under its statute which applies a single undifferentiated assessment to both real property and personal property. [G.S. 105-333 through -341] the state assumed the burden of establishing facts sufficient both to warrant a different conclusion with respect to personal property and to enable the district court to fashion a decree that would not frustrate efforts to alleviate the discrimination already proven as to real property.

. . . Under North Carolina law, the Property Tax Commission is obligated to order a reduction in the assessment of a railroad's property once the railroad establishes an "inequitable difference" between its assessment and that of taxpayers whose property is assessed locally by county authorities. N.C. Gen. Stat. Section 105-342(c)(5). Proof of that "inequitable difference" (defined, for state equalization purposes, as a difference of 15 percent, Section 105-342(c)(4) ), rebuts the presumption of correctness which an appraisal enjoys, e.g., *In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E. 2d 752 (1975), and can be supplied, under Section 105-342(c)(5), by the selfsame sales-assessment ratio study favored by Section 306(2)(e).

700 F. 2d at 131.

In *Clinchfield II*, the court considered the narrow issue of whether the named counties discriminated in the assessment and

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In re Appeal of Duke Power Co.

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taxation of railroad personalty and if so, to what extent. In so doing, the court explained its holding in *Clinchfield I*:

First, [in *Clinchfield I*] we held that a sales-assessment ratio study alone was insufficient under Section 306 to prove discrimination with respect to both real and personal property. . . . We held, however, that a railroad can make out a prima facie case of discrimination for all property through a sales-assessment ratio study. The burden then shifts to the State and counties to establish facts sufficient to show both higher ratios of assessment for personal property and the breakdown by percentage of the respective worths of the railroads' real and personal property.

784 F. 2d at 548. Further, the court in *Clinchfield II* rejected the counties' argument that the burden of proof should not have shifted since North Carolina law provides that ad valorem tax assessments are presumed to be correct; a presumption that is rebutted only by evidence of arbitrary or illegal acts by tax officials and substantial overassessment or underassessment. *Id.* at 549. See *In re Appeal of Amp, Inc.*, *supra*. The counties in *Clinchfield II* argued that once they presented evidence of regularity, North Carolina law presumes 100 percent assessment and requires the taxpayer to come forward with evidence of arbitrary or illegal acts and substantial disparity in assessment levels. The Fourth Circuit answered the counties' contentions by reiterating its earlier holding in *Clinchfield I*, that once North Carolina was shown to have discriminated with respect to real property assessment the burden shifted to the State and counties to establish facts sufficient to warrant a different conclusion with respect to personal property. 784 F. 2d at 549 (quoting *Clinchfield I*, 700 F. 2d at 131).

G.S. 105-345.2 is the controlling judicial review statute for appeals from the Property Tax Commission. *In re McElwee*, 304 N.C. 68, 283 S.E. 2d 115 (1981). Subsection (b) of the statute provides in pertinent part that:

(b) The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

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In re Appeal of Duke Power Co.

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- (1) In violation of constitutional provisions; or
- (2) In excess of statutory authority or jurisdiction of the Commission; or
- (3) Made upon unlawful proceedings; or
- (4) Affected by other errors of law; or
- (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. . . .

Duke introduced competent, material and substantial evidence by its sales/assessment ratio study that Guilford County appraised locally assessed real property at 80.12 percent of true market value. Under the logic of *Clinchfield I* and *II*, this established a prima facie case of an "inequitable difference" sufficient to shift the burden to the county to rebut Duke's evidence as to real property and to come forward with evidence as to the assessment levels for personal property. In denying Duke's motion, the Commission refused to shift the burden and based its conclusion of law, that the overall assessment of property in Guilford County as of 1 January 1983 was 85.19 percent, on its opinion that Duke's evidence was insufficient to carry the burden of showing that the county failed to assess personal property at market value. We believe that the denial of Duke's motion to shift the burden of proof and the Commission's opinion that Duke carried the burden with respect to personal property constitutes an error of law as set forth in G.S. 105-345.2(b)(4).

Guilford's argument that the *Clinchfield* cases do not apply because they concern a federal statute (the 4-R Act) must be rejected. As explained in *Clinchfield I*, the federal statute, specifically Section 306(2)(d), provides that the burden of proof with respect to determining assessed value and true market value "shall be that declared by the applicable State law." 700 F. 2d at 131. In determining the burden of proof under Section 306 the

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In re Appeal of Duke Power Co.

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Fourth Circuit Court was required to interpret and apply North Carolina law as to the burden of proof and did so under the provisions of G.S. 105-342(c). Their interpretation was correct.

Additionally, in opposing the application of the *Clinchfield* cases, Guilford County argues three reasons that the sales/assessment ratio study is not the "clear and exclusive" means for a public service company to establish an "inequitable difference." First, they note that the federal district court in *Clinchfield Railroad Company v. Lynch*, 527 F. Supp. 784 (E.D.N.C. 1981) approved of their argument that a study which excludes personal property is incomplete. However, the district court was bound by the provisions of Section 306 which clearly expressed Congress' preference for proof of discrimination by sales/assessment ratio studies. Second, the provisions of G.S. 105-342(c)(1) require the inclusion of "sales/assessment ratio studies or other appraisal information. . . ." [Emphasis added.] Third, G.S. 105-342(d) provides that at a hearing under this Section the Commission shall hear *all* of the evidence offered by the taxpayers. In light of these factors, we are not persuaded by Guilford's argument here.

First, as we have stated in relying on the *Clinchfield* cases, by introducing a sales/assessment ratio study showing real property assessment at 80.12 percent of true market value, Duke made out a prima facie case of an "inequitable difference." As *Clinchfield II* points out, a sales/assessment ratio study *alone* is insufficient to *prove* discrimination. It is only sufficient to make out a prima facie case and shift the burden of proof from the taxpayer to the State and counties. 784 F. 2d at 548. Second, G.S. 105-342(c) was enacted to alleviate the inequity created by our statutory scheme of appraising locally assessed real property every eighth year and appraising centrally assessed public service companies' system property (real and personal) every year. The inequity lies with real property appraisal and assessment. By showing an "inequitable difference" with respect to real property, the public service company has demonstrated the inequity which the statute seeks to correct. Therefore, we believe our decision is consistent with the legislative purpose of enacting G.S. 105-342(c).

Accordingly, we reverse the Commission's final decision and remand the case for further proceedings consistent with this opinion. Since we have disposed of this case on the basis of appellants'

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**Brooks v. Rogers**

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first assignment of error we need not reach appellants' second and third assignments.

Reversed and remanded.

Judges ARNOLD and PARKER concur.

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NANCY C. BROOKS v. LEE ROGERS; CAROLINA BUSINESS CONSULTANTS, INC.; LEE ROGERS, INC.; BURROUGHS AND ROGERS, INC.; AND LEE ROGERS AND RUTH R. BURROUGHS D/B/A BURROUGHS AND ROGERS, A PARTNERSHIP

No. 8618SC110

(Filed 19 August 1986)

**Rules of Civil Procedure § 13— complaint dismissed—compulsory counterclaim—leave to file as counterclaims**

The trial court properly dismissed an action against a financial adviser where the plaintiffs claims were compulsory counterclaims in defendants' action against plaintiff under the terms of N.C.G.S. § 1A-1, Rule 13(a) because they were extant at the time defendant Rogers filed his action; they did not require for their adjudication the presence of third parties over whom the court could not acquire jurisdiction; the two specific exceptions in N.C.G.S. 1A-1, Rule 13(a) clearly did not apply; and the claims arose out of the transaction or occurrence that was the subject matter of the opposing party's claim in that they involved a common factual background, involved substantially the same evidence, and were logically intertwined. However, the court erred by failing to grant leave to file those claims as counterclaims in defendants' action against plaintiff.

APPEAL by plaintiff from *Rousseau, Judge*. Order entered 3 September 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 5 June 1986.

*Richard M. Pearman, Jr., for plaintiff appellant.*

*Kirby, Wallace, Creech, Sarda & Zaytoun, by John R. Wallace, for defendant appellees Lee Rogers, Carolina Business Consultants, Inc., and Lee Rogers, Inc.*

*McMillan, Kimzey, Smith & Roten, by Russell W. Roten, for defendant appellees Burroughs and Rogers, Inc., and Lee Rogers and Ruth R. Burroughs d/b/a Burroughs and Rogers partnership.*

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**Brooks v. Rogers**

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BECTON, Judge.

This appeal is from an order dismissing plaintiff Nancy C. Brooks' action on the ground that it should have been filed as a counterclaim in a prior pending action. We modify and affirm the trial court's order.

The main issue before us is whether, under Rule 13(a) of the North Carolina Rules of Civil Procedure, the claims filed by Brooks in her Guilford County action constitute compulsory counterclaims in a prior action filed in Wake County by defendant Lee Rogers.

I

Nancy C. Brooks filed an action in Guilford County on 13 September 1983. She sued Lee Rogers, individually, and several corporations and one partnership through which Rogers allegedly acted to defraud Brooks. She alleged in her complaint that in September 1980, she retained Rogers as a personal and confidential financial advisor to assist her in managing an inheritance she had received when her husband had died one month earlier. According to Brooks, Rogers instructed her to issue a \$10,000 check to one of the defendant corporations of which Rogers was president and principal stockholder. Rogers allegedly represented himself to be an expert in personal financial management and convinced Brooks to invest her money through him and his businesses. Brooks claims that, as part of Rogers' scheme, he convinced her to purchase a \$100,000 certificate of deposit which was to be used primarily as collateral for loans.

Brooks then described in her complaint a series of investment transactions arranged for Brooks by Rogers, including the purchase and sale of a motel, an apartment complex, and two residential lots on which houses were to be constructed. In some of these transactions, Rogers co-invested with Brooks through various business entities.

Brooks claimed that Rogers engaged in a pattern of extensive misrepresentation, conversion of Brooks' funds, fraud, forgery, and unfair and deceptive trade practices regarding these investments and her funds. She also claimed that Rogers breached his fiduciary duty toward her in handling her in-

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**Brooks v. Rogers**

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heritance tax return, income tax return, and a mortgage loan for a home she planned to buy in Greensboro.

Finally, Brooks alleged that Rogers breached his promise not to totally deplete her certificate of deposit, and she claimed that this breach left her unable to satisfy her liability to State Bank for certain interest payments. According to Brooks, she received two unsolicited payments from Rogers, checks for \$10,653.33 and \$2,092.55, which contained no restrictions or explanations. She endorsed the checks, believing them to be late returns on her investments. She received a third check from Rogers, for \$949.82, on 16 March 1983, which she treated as the others; but it was returned for insufficient funds.

The allegedly wrongful acts spanned a period of nearly three years.

In her prayer for relief, Brooks requested \$200,000 damages, \$500,000 punitive damages, treble damages and attorney's fees. She also asked the court to issue an order of Arrest and Bail as to Rogers.

On 9 November 1983, default judgment was entered as to defendant Lee Rogers, Inc. On 15 November 1983, the remaining defendants filed a motion to dismiss and abate Brooks' action on the ground that a prior pending action in Wake County arose out of the same transactions and occurrences alleged by Brooks.

An action had been filed by Rogers, individually, against Brooks in Wake County on 30 August 1983. In the Wake County action, Rogers claimed that he had made loans to Brooks of \$10,653.33 and \$2,092.55 of which \$12,092.55 remained unpaid; that he had advanced \$8,038.74 for the construction of a house which had not been repaid; that Brooks' \$1,457.35 interest obligation to Branch Banking and Trust Company for a construction loan had been satisfied by Burroughs & Rogers, Inc. and Lee Rogers, Inc. who subsequently assigned their claims to Rogers; and that Brooks was unjustly enriched by the total of the advances (\$9,496.09) made on her behalf.

Finally, Rogers claimed that a \$125,000 construction loan for the apartment complex had been made jointly to Brooks, to a corporation in which Rogers was a shareholder, and to other investors. According to Rogers, when this loan came due, all the



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**Brooks v. Rogers**

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owners except Brooks agreed to execute a new note to Branch Banking and Trust; he alleged that Brooks made false and misleading statements to the bank which were intended to and did damage Rogers' business reputation with the bank.

Rogers requested \$250,000 general compensatory damages for the alleged libel, \$12,092.55 for the loans and \$9,496.09 for the advances.

On 30 November 1983, mistakenly believing service of process rather than the filing of a complaint determined the commencement of an action, Brooks filed a motion to dismiss and abate Rogers' Wake County action. On 9 July 1984, the Wake County Superior Court denied Brooks' motion. The basis for its ruling was that the Wake County action had been initiated before the Guilford County action, and that, therefore, the Guilford County action could not be a "prior pending action." Nothing in the Order indicates the court's opinion as to whether Brooks' claims in the Guilford County action should have been asserted as compulsory counterclaims in Rogers' Wake County action.

On 26 March 1985, venue for Rogers' Wake County action was transferred to Guilford County. On 20 August 1985, Brooks moved to consolidate the two cases, asserting that they involved "common questions of law and fact."

On 3 September 1985, the Guilford County Superior Court issued an order granting a motion, filed on 15 November 1983 by the defendants in Brooks' action, to dismiss and abate Brooks' case. Brooks appeals from this Order. She argues that the court erred in dismissing her action because (1) the court had no factual basis for its orders; (2) Brooks' claims against Rogers do not constitute compulsory counterclaims in Rogers' action; (3) Brooks' claims against the other defendants do not constitute compulsory counterclaims in Rogers' action; and (4) all defendants waived their rights to object to this proceeding. Finally, she argues that (5) the court erred in refusing to rule on her motion for sanctions.

We affirm the dismissal of Brooks' action, but we modify the trial court's order to grant leave to Brooks to file her claims as counterclaims in Rogers' pending action.

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**Brooks v. Rogers**

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**II**

The main issue we are asked to consider is whether Brooks' claims are compulsory counterclaims in Rogers' action. We address this issue first, as it is dispositive of all Brooks' arguments on appeal.

Defendants' motion to dismiss Brooks' action is based on Rule 13(a) of the North Carolina Rules of Civil Procedure which provides:

*Compulsory counterclaims.*—A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if

- (1) At the time the action was commenced the claim was the subject of another pending action, or
- (2) The opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

We reject Brooks' argument that no claim can be considered a compulsory counterclaim unless it is against the original opposing party or parties. Although to succeed on a theory of common law abatement, strict identity of parties was required, *see Cameron v. Cameron*, 235 N.C. 82, 68 S.E. 2d 796 (1952), this appeal involves the new rule, Rule 13(a), which clearly contemplates that all counterclaims arising out of the same transaction or occurrence be asserted even if other parties must then be joined, *as long as the court can acquire jurisdiction over them*. And we recognize there is dicta in *Gardner v. Gardner*, 294 N.C. 172, 175 n. 5, 240 S.E. 2d 399, 402 (1978) suggesting that although the former plea in abatement is abolished, the substantive law of abatement may still be applicable. To the extent that it is, there is no abatement here. There is no identify of the parties, and

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**Brooks v. Rogers**

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judgment on the merits in favor of Rogers in the first action will not bar Brooks' prosecution of the second. *See Cameron*.

We also reject Rogers' contention that the 9 July 1984 Order, which has not been appealed, resolved whether Brooks' claims were compulsory counterclaims under Rule 13(a). The court simply determined that Brooks' motion to dismiss and abate Rogers' action could not be granted because Rogers' action had been filed first.

The proper analysis under Rule 13(a) was set forth in *Gardner* (applying the rule to domestic actions). *See Atkins v. Nash*, 61 N.C. App. 488, 300 S.E. 2d 880 (1983) (holding that the *Gardner* analysis is generally applicable in all types of cases). The *Gardner* Court held that if an action may be denominated a compulsory counterclaim in a prior action, it must be either (1) dismissed with leave to file it in the former case or (2) stayed until the conclusion of the former case. 294 N.C. at 177, 240 S.E. 2d at 403. Because the purpose of Rule 13(a) is to combine related claims in one action, "thereby avoiding a wasteful multiplicity of litigation," *id.* at 176-77, 240 S.E. 2d at 403 (quoting Wright & Miller, *Federal Practice and Procedure*, Sec. 1409, at 37 (1971)), we believe the option to stay the second action should be reserved for unusual circumstances, not present in the case at bar. *See generally* Note, *Civil Procedure—New Rules for an Old Game: North Carolina Compulsory Counterclaim Provision Applies in Divorce Suits*, 57 N.C.L. Rev. 439, 444-45 (1979). Therefore, if Brooks' action constitutes a compulsory counterclaim in Rogers' action, it must be dismissed with leave to file it as such in Rogers' case.

We conclude that under the terms of Rule 13(a), Brooks' claims are compulsory counterclaims in Rogers' action. They were extant at the time Rogers filed his action; they do not require for their adjudication "the presence of third parties of whom the court cannot acquire jurisdiction"; and the two specific exceptions in Rule 13(a) clearly do not apply. *See Atkins*.

The claims also arise out of "the transaction or occurrence that is the subject matter of the opposing party's claim. . . ." In determining whether certain claims arose out of the same transaction or occurrence as a prior action for purposes of treating them as compulsory counterclaims, several factors are considered: (1) whether the issues of fact and law are largely the same; (2)

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**Brooks v. Rogers**

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whether substantially the same evidence is involved in each action; and (3) whether there is a logical relationship between the two actions. *Curlings v. Macemore*, 57 N.C. App. 200, 202, 290 S.E. 2d 725, 726 (1982) (quoting *Whigham v. Beneficial Finance Company of Fayetteville*, 599 F. 2d 1322, 1323 (4th Cir. 1979)). There must be not only a common factual background but also a logical relationship in the nature of the actions and the remedies sought. *Twin City Apartments, Inc. v. Landrum*, 45 N.C. App. 490, 493-94, 263 S.E. 2d 323, 325 (1980).

A careful comparison of the allegations in Brooks' complaint with those in Rogers' reveals that the two actions arose out of the same factual background. Ironically, Brooks argued in paragraph 5 of her 30 November 1983 motion to dismiss and abate Rogers' action that the actions are logically related and involve many similar claims:

5. The subject matter of the pending action [brought by Brooks] in Guilford completely covers and encompasses the claims of the plaintiff herein against Nancy C. Brooks, which arise out of the fiduciary relationship which exist[ed] between the plaintiff and Brooks and the investment policies employed by the plaintiff in connection with said Nancy C. Brooks, resulting in losses for fraud, forgery, and the like. Moreover the relationship between these two involved the construction of two houses in Wake County, an apartment complex in Watauga County and the purchase and sale of a motel complex in Watauga County. All of the claims of the plaintiff herein deal with damages and losses which he maintains he suffered as [a] result of this relationship. Similar claims, although of a more expensive [sic] nature, are asserted by Nancy C. Brooks in her action in Guilford County.

We agree that the actions involve a common factual background; they also involve substantially the same evidence. In order to recover on her claims, Brooks will have to prove, at the least, the extent and nature of Rogers' fiduciary relationship with her; the terms of their agreements and his representations of her obligations; and their understandings regarding the status of funds that passed between them. Rogers will have to rely on substantially the same evidence to prove that he advanced money on Brooks' behalf with her consent and in the course of representing

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**Brooks v. Rogers**

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her interests and that the funds he gave her were loans, not late returns on her investments. Each party obviously must rely on different explanations and theories of recovery. Nonetheless, on the facts of this case, the determination whether a given transaction had a legal effect as asserted by one party necessarily will resolve the conflicting assertion as to the law by the other party.

The claims are also logically intertwined, both in fact and in law. For example, Rogers claims Brooks owes money for advances he made as her authorized agent regarding the construction of a certain house, while Brooks claims that Rogers misrepresented his credentials and fraudulently acquired her money for this investment. Rogers contends that Brooks failed to repay two loans; she claims the transactions were repayments on her investments, not loans at all. Rogers claims Brooks wrongfully refused to execute a new promissory note when the old note came due, thereby damaging his business reputation; she asserts that he misappropriated the funds raised by the original note and breached his fiduciary duties to document and account for her ownership interests in the property he allegedly purchased on her behalf.

We recognize that each party asserts legal theories not asserted by the other. *Compare Atkins* (Both sides asserted claim for breach of contract.); *Powell Manufacturing Company v. Harrington Manufacturing Company*, 30 N.C. App. 97, 226 S.E. 2d 173 (Both sides asserted claims for false advertising concerning the same type of equipment.), *appeal dismissed and disc. rev. allowed for limited purpose of granting leave to assert counterclaims*, 290 N.C. 662, 228 S.E. 2d 454 (1976), *appeal dismissed and cert. denied*, 429 U.S. 1031, 50 L.Ed. 2d 743, 97 S.Ct. 722 (1977). But Rule 13(a) does not require that the legal claims be identical. It is sufficient that the nature of the actions and the remedies sought are logically related in fact and law. The case at bar is distinguishable from cases in which the only connection or logical nexus between the claims and counterclaims was the relationship between the parties as landlord and tenant. *See, e.g., Winston-Salem Joint Venture v. Cathy's Boutique, Inc.*, 72 N.C. App. 673, 325 S.E. 2d 286 (1985); *Curlings*.

*Moretz v. Northwestern Bank*, 67 N.C. App. 312, 313 S.E. 2d 8, *disc. rev. denied*, 311 N.C. 761, 321 S.E. 2d 141 (1984) supports the decision in the case at bar. In *Moretz*, this Court concluded

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**Brooks v. Rogers**

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that an action for unfair and deceptive trade practices alleging that the defendant willfully failed to fulfill a condition precedent on a promissory note would constitute a compulsory counterclaim that should have been filed in a prior action to recover money on the same note. Nonetheless, we held that, based on principles of equity, the second action should be allowed to avoid frustrating the equitable purposes and remedies contained in N.C. Gen. Stat. Sec. 75-1.1 (1981) (recompiled 1985). 67 N.C. App. at 314-15, 313 S.E. 2d at 10. In the case at bar, the prior action is apparently still pending, and, under *Gardner*, Brooks would be granted leave to assert her counterclaims in that action. See *Gardner*; *Atkins*.

The fact that Brooks named as defendants in her action several parties not named in Rogers' action is not significant in this case. The additional parties are all business entities through which (according to Brooks) Rogers acted to defraud her of her inheritance. In fact, two of these additional parties assigned to Rogers their claims against Brooks. Brooks' claims against these parties arose out of the same transactions that are the subject matter of Rogers' claims against Brooks. Brooks may join these parties in Rogers' action under Rule 13(h).

We hold that Brooks' claims may be denominated compulsory counterclaims in Rogers' prior action. Therefore, the trial court properly dismissed Brooks' action. But the court erred in failing to grant leave to file those claims as counterclaims in Rogers' action. We remand the case for the court to enter this instruction. If Rogers' action has proceeded to judgment by the time this case is remanded, Brooks' equitable claims should proceed to trial. See *Moretz*.

### III

Because of our resolution of the compulsory counterclaim issue, Brooks' first argument must fail. Brooks argues that the court did not have the complete files of both cases before it and that, therefore, it was error to make a factual determination that Brooks' claims were compulsory counterclaims. But even assuming these assertions are correct, we hold that the alleged error was harmless. We also note that *Curlings* does not, as Brooks asserts, require the trial court to make specific findings of fact in the record.

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Stanley v. Gore Brothers

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We also reject Brooks' argument that the defendants waived their right to argue that her case should be dismissed. Contrary to Brooks' suggestions, the record reveals that defendants did not voluntarily participate in discovery in Brooks' action—they were ordered to respond to Brooks' interrogatories and requests for documents. More importantly, defendants moved to dismiss Brooks' action based on a prior pending action soon after they were served with process. Thus, the decision in *Bethea v. Bethea*, 43 N.C. App. 372, 258 S.E. 2d 796 (1979), *disc. rev. denied*, 299 N.C. 119, 261 S.E. 2d 922 (1980) does not apply to this case.

Finally, because the case was properly dismissed, we affirm the trial court's refusal to rule on Brooks' motion for sanctions relating to discovery.

## IV

For the reasons stated above, the trial court's dismissal of Brooks' action on the ground that her claims should have been filed as compulsory counterclaims under Rule 13(a) in a prior pending action is modified and affirmed. The trial court is instructed to grant leave to Brooks to file her claims as counterclaims in Rogers' action.

Modified and affirmed.

Judges ARNOLD and WELLS concur.

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EDGAR STANLEY v. GORE BROTHERS, EMPLOYER; AMERICAN MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8520IC1296

(Filed 19 August 1986)

**1. Judgments § 37.4; Master and Servant § 94.2— workers' compensation—claim barred by res judicata**

The doctrine of *res judicata* barred plaintiff's claim for disability based on seizures, headaches and dizzy spells where a similar claim had been previously denied because of plaintiff's failure to prove a causal connection to plaintiff's injury by accident, notwithstanding plaintiff offered subsequent medical testimony that the seizures, headaches and dizzy spells were causally connected to the accident. Furthermore, plaintiff's claim for "irreparable injury to

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**Stanley v. Gore Brothers**

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his brain" was subsumed within his prior claim for compensation based on seizures, headaches and dizzy spells and was also barred by *res judicata*.

**2. Master and Servant § 73— injury to important part of body—amount of compensation—discretion of Commission**

The amount of compensation which the Industrial Commission awards under N.C.G.S. § 97-31(24) is within the discretion of the Commission.

**3. Master and Servant § 73— workers' compensation—award for loss of smell and damage to facial nerves**

Compensation was properly awarded for loss of smell and for damages to the nerves and muscles in the right side of plaintiff's face under provisions of N.C.G.S. § 97-31(24) permitting compensation for loss or damage to an organ or important part of the body. Furthermore, compensation could properly be awarded under this statute without proof of diminished wage-earning capacity.

**4. Master and Servant § 91— workers' compensation—loss of smell and damage to facial nerves—claim not time barred**

Plaintiff's claim for compensation for loss of smell and damage to facial nerves and muscles was not barred by *res judicata* or by the passage of time where these symptoms did not manifest themselves immediately after the accident; plaintiff timely pursued his claim following the first medical evaluation of these symptoms some six years after the accident; and plaintiff did not seek compensation for loss of smell and damage to facial muscles between the time of the accident and the first medical evaluation of those symptoms.

**5. Master and Servant § 73.1— workers' compensation—award for blurred and double vision—damage to important part of body**

The evidence supported findings that plaintiff's loss of visual acuity in his right eye and his blurred and double vision resulting from damage to the nerves and muscles in the orbit of his right eye were two separate injuries, and an award for plaintiff's blurred and double vision was properly made under N.C.G.S. § 97-31(24) as compensation for damage to an important part of the body although plaintiff had previously received compensation for the loss of visual acuity.

FROM an opinion and award of the North Carolina Industrial Commission filed 8 July 1985, the claimant, Edgar Stanley, and the employer, Gore Brothers, appeal. Heard in the Court of Appeals 13 May 1986.

*McCain & Essen, by Grover C. McCain, Jr. and Jeff Erick Essen, for plaintiff appellants.*

*Teague, Campbell, Dennis & Gorham, by George W. Dennis, III, for defendant appellants.*



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Stanley v. Gore Brothers

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BECTON, Judge.

From an opinion and award of the North Carolina Industrial Commission (Commission) in this workers' compensation case, both parties appeal. Neither party has shown error, and we affirm.

I

On 10 April 1978, Edgar Stanley suffered a severe head injury when a portion of a tire rim exploded and struck him in his face. Because the injury arose out of and in the course of employment, defendant employer, Gore Brothers, paid Mr. Stanley temporary total disability benefits during the initial healing periods. The extent of Mr. Stanley's disabilities was not immediately known however. Therefore, three separate hearings were held between 29 June 1981 and 2 August 1984 to determine what compensation he was entitled to receive in addition to the temporary total disability benefits already paid.

As a result of the first hearing in 1981, Mr. Stanley was awarded \$8,000 for facial disfigurement and additional compensation for a 23.5% loss of vision in the right eye.

On 13 July 1982, a second hearing was conducted, and additional medical reports were stipulated in evidence. Mr. Stanley was awarded compensation benefits for an additional 18% permanent partial disability of the right eye. Dr. Lyndon Anthony had been subpoenaed for the second hearing, but he failed to appear. Therefore, the Deputy Commissioner ordered that the "case be reset . . . for hearing regarding the issues . . . which could not be determined due to Dr. Anthony's failure to appear to testify."

At the 1 December 1982 rescheduled hearing, Mr. Stanley chose not to offer testimony from Dr. Anthony but rather stipulated that the Deputy Commissioner could use Dr. Anthony's medical records as evidence. In a 14 January 1983 Opinion and Award, Deputy Commissioner Scott denied Mr. Stanley's claim on the basis of two findings of fact:

1. Plaintiff returned to Dr. Anthony's office on June 22, 1982 after not having been seen by him since February 1981. Plaintiff complained of having had a convulsion as well as some headaches and dizzy spells. Dr. Anthony treated him for these problems at least to September 1982.

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Stanley v. Gore Brothers

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2. No causal relationship was shown between the problems for which plaintiff was being treated by Dr. Anthony beginning in June 1982 and his injury by accident on 10 April, 1978, nor was any disability shown.

Mr. Stanley never appealed the 14 January 1983 ruling. Rather, on 18 January 1984, through his new attorney, Mr. Stanley requested a hearing on "change in condition and for other such workers' compensation benefits that plaintiff may be entitled to under law." At the hearing, Mr. Stanley introduced testimony by deposition of Dr. Barrie Hurwitz, a neurologist at Duke University Medical Center, as well as his own testimony and that of his wife.

Following the requested hearing, the Deputy Commissioner entered another Opinion and Award on 2 August 1984 finding that Mr. Stanley was entitled to compensation of (a) \$8,000 for blurred and double vision; (b) \$5,000 for loss of sense of smell and taste (an important part of the body); and (c) \$2,000 for permanent damage to the nerve and muscles in the right side of the face which caused slurred speech. The Deputy Commissioner, however, denied Mr. Stanley's claim for compensation based on seizures, headaches and dizzy spells, concluding that Mr. Stanley was bound by the 14 January 1983 ruling and the doctrine of *res judicata*.

On 3 July 1985 the Commission affirmed the Deputy Commissioner's decision, and both parties appeal to this Court.

## II

### Plaintiff's Appeal

[1] Mr. Stanley first assigns error to the Commission's findings and conclusions that he is not entitled to any award for convulsions, headaches and seizures. Mr. Stanley concedes that these medical problems were the subject of an earlier Opinion and Award in 1983, but in an effort to avoid the bar of the doctrine of *res judicata*, Mr. Stanley argues that the "convulsions, headaches and seizures" for which he is now seeking compensation are not the same "convulsions, headaches and seizures" for which he previously sought compensation. We disagree.

Although Mr. Stanley's history of headaches, dizziness and seizures dated back to his 10 April 1978 injury by accident, the

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**Stanley v. Gore Brothers**

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record contains no evidence of two different kinds of headaches or dizziness, or of earlier or later seizures. Indeed, all of Mr. Stanley's seizures, grand mal and partial, occurred before 1983 or in 1983, the year in which Deputy Commissioner Scott first denied his claim. Moreover, neither Mr. Stanley's complaints of symptoms nor his treatment and medication based on his complaints changed between 1978 and the date Deputy Commissioner Scott first denied his claim.

In her 14 January 1983 opinion and award, Deputy Commissioner Scott concluded:

In that plaintiff did not prove a causal relationship between the convulsions, headaches, and dizzy spells for which he was treated by Dr. Anthony and his injury by accident on April 10, 1978, he is not entitled to recover for the medical expenses incurred or any disability he might have sustained as a result thereof.

Significantly, Mr. Stanley squandered at least two opportunities before Deputy Commissioner Scott's 14 January 1983 ruling to show the requisite causal connection. First, he chose to submit Dr. Anthony's "two pages of office notes" in lieu of calling Dr. Anthony as a witness. Second, instead of requesting another hearing to prove a causal connection, Mr. Stanley requested that his case be removed from the inactive docket and that a decision be rendered even though all parties had been specifically informed that Dr. Anthony's "reports did not give any information upon which an Opinion and Award could be based." Equally important, Mr. Stanley failed to appeal the 14 January 1983 ruling.

It is true that in January 1984, Dr. Hurwitz stated that Mr. Stanley's seizures, headaches and dizzy spells were caused by the accident and subsequent surgery which produced a loss of brain tissue in Mr. Stanley's right frontal lobe. This evidence, however, came a year too late, as Deputy Commissioner Scott's finding of fact in her 2 August 1984 opinion and award indicates: "Although plaintiff has now produced evidence of a causal relationship between his seizures, headaches, and dizzy spells in [sic] this accident by reason of brain damage he has sustained, a finding as to this issue has previously been made." In short, Mr. Stanley's claim of disability based on seizures, headaches, and dizzy spells was denied for lack of proof. Our law does not allow him to

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Stanley v. Gore Brothers

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relitigate that claim *ad infinitum*. The doctrine of *res judicata* was correctly applied by Deputy Commissioner Scott and the Commission.

## III

Based on our analysis in Part II, *supra*, we summarily reject Mr. Stanley's argument that the Commission erred in its finding of fact regarding the anti-seizure medication used by him. If Mr. Stanley is not entitled to recover compensation for his seizures, then, *a fortiori*, the Commission properly refused to order the employer, Gore Brothers, to provide anti-seizure medication to Mr. Stanley.

## IV

Based on our analysis in Part II, *supra*, we also reject Mr. Stanley's argument that the Commission erred "in affirming the hearing commissioner's failure to make findings, conclusions, or any award for loss of the right frontal lobe of plaintiff's brain, an important internal organ of the body." Mr. Stanley's claim of "irreparable injury to his brain" was subsumed within his claim for compensation based on seizures, headaches, and dizzy spells. No provision of the Workers' Compensation Act allows Mr. Stanley to recover compensation for these specific medical problems or symptoms. In order to recover compensation for these symptoms, Mr. Stanley had to show that he sustained damage to his brain, an important internal organ of the body.

As a result of the explosion and the later surgical removal of the damaged area, we know that Mr. Stanley lost the right frontal lobe of his brain. According to Dr. Hurwitz, this porencephaly is confirmed by CT scans and x-rays which show that tissue has been removed from that area of Mr. Stanley's brain.

However, as Deputy Commissioner Scott noted in her 14 January 1983 Opinion and Award, Mr. Stanley failed timely to prove his claim. Two separate hearings were scheduled in 1982 during which Mr. Stanley could have offered evidence from Dr. Anthony who operated on and treated Mr. Stanley as a result of the 10 April 1978 injury. And the evidence was obviously available to Mr. Stanley, since Dr. Hurwitz himself relied in part on office and operative notes of, as well as lab reports by, Dr. Anthony. Mr. Stanley also had a right to appeal from Deputy Commissioner

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**Stanley v. Gore Brothers**

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Scott's decision, but he did not do so. We conclude that the doctrine of *res judicata* was correctly applied to this issue by Deputy Commissioner Scott and the Commission.

**V**

[2] In assignments of error three, four and five, Mr. Stanley argues that the Commission erred in limiting his award to \$5,000 for loss of sense of smell, \$8,000 for blurred and double vision, and \$2,000 for damage to the nerves and muscles in the right side of his face. Because of our conclusion in Part VI, *infra*, we treat this issue summarily. The amount of compensation which the Commission awards under N.C. Gen. Stat. Sec. 97-31(24) (1985), is within the discretion of the Commission. *Little v. Penn Ventilator Company*, 75 N.C. App. 92, 330 S.E. 2d 276 (1985). Mr. Stanley has failed to show an abuse of discretion, and we therefore reject his argument that the Commission erroneously limited his awards.

**VI****Defendants' Cross Appeal**

Gore Brothers excepted to and assigned as error the Commission's award of additional compensation benefits for blurred and double vision, loss of sense of smell, and permanent damage to the nerves and muscles in the right side of Mr. Stanley's face. In support of their assignments of error, Gore Brothers claims that (1) no provision of the Workers' Compensation Act provides for these losses; (2) plaintiff has not proven loss of earnings or earning capacity; and in any event, such claims are barred by (3) the doctrine of *res judicata* and (4) the failure of plaintiff to timely pursue these claims.

A. Loss of the Sense of Smell and Permanent Damage to the Nerves and Muscles in the Right Side of Mr. Stanley's Face.

[3] It is true that no provision of the Workers' Compensation Act specifies the payment of benefits due to the loss of a sense of smell or damages to the nerves and muscles of an employee's face. However, benefits are awarded under G.S. 97-31(24) for loss of or permanent injury to important external or internal organs or parts of the body, and we hold that the Commission properly used G.S. 97-31(24) in awarding benefits in this case. In so doing, we reject defendants' argument that proof of diminished wage-earning capacity is required under G.S. 97-31(24).

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**Stanley v. Gore Brothers**

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In support of its claim that Mr. Stanley must prove diminished wage-earning capacity, Gore Brothers argues that an analogy must be made between cases involving disfigurement under G.S. 97-31(21) and (22) and cases involving loss or damage to an organ or important part of the body under G.S. 97-31(24). The analogy rests on the fact that subsections 21, 22 and 24 of G.S. 97-31 contain no specified period of presumed disability. This absence of "a stated number of weeks" of disability, Gore Brothers claims, renders the three subsections virtually identical and, therefore, subject to an identical interpretation. Our response is threefold. First, in *Grant v. Burlington Industries, Inc.*, 77 N.C. App. 241, 335 S.E. 2d 327 (1985), this Court found that partial loss of a lung, as loss of an important organ, was compensable under G.S. 97-31(24) and that proof of diminished wage-earning capacity was not required. Specifically, we held:

As disability is presumed from a showing of a scheduled injury under G.S. Sec. 97-31(24), we find no statutory justification for excluding loss of or permanent injury to the lungs resulting from occupational disease from the coverage of G.S. Sec. 97-31(24), and no statutory justification for making a specific finding of disability a condition precedent for recovery thereunder.

Second, although compensation for loss or damage to an organ or important part of the body was at one time subsumed under the bodily disfigurement subsections of G.S. 97-31, the Workers' Compensation Act now provides benefits for loss of organ as an injury separate and distinct from disfigurement, compensable in its own right and subject to its own standards, under subsection 24. Third, disfigurement under subsections 21 and 22 are compensable only when the seriousness of the disfigurement may be reasonably presumed to in some way affect wage-earning capacity; however, the seriousness of the injury does not have to be proven under subsection 24. Certain injuries, such as loss or damage to an organ or part of the body, have always been construed to be serious injuries affecting a person's ability to live and work, and as such, have been compensable regardless of wage-earning capacity. See *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 229 S.E. 2d 325 (1976), *disc. rev. denied*, 292 N.C. 467, 234 S.E. 2d 2 (1977).

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**Stanley v. Gore Brothers**

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[4] We also reject Gore Brothers' additional argument that plaintiff's "claim for compensation due to an alleged loss of the sense of smell and damage to the nerves and muscles in the right side of his face is also barred by the passage of time and the doctrine of *res judicata*." These symptoms did not manifest themselves immediately after the accident. Further, the first opinion and award filed in this matter on 20 March 1981 covered only Mr. Stanley's loss of vision and the disfigurement of his face. It was not until 18 January 1984—almost three years later—that the loss of smell, and the damage to facial nerves and muscles were medically evaluated and shown to relate to the April 1978 accident. It was then that Dr. Hurwitz noted the causal connection between Mr. Stanley's head injury and the symptoms he was *then* experiencing. That Mr. Stanley had an opportunity to consult Dr. Hurwitz before January 1984 is not dispositive. At no time between April 1978 and January 1984 did he seek compensation for loss of smell and damage to facial muscles. Following the first medical evaluation of these symptoms, however, he timely pursued his claim.

#### B. Blurred and Double Vision

[5] The Commission also awarded Mr. Stanley \$8,000 for permanent damage to the nerves and muscles in the orbit of his right eye, causing double and blurred vision. After considering the medical testimony of Dr. Hurwitz, Deputy Commissioner Scott, in her 2 August 1984 opinion and award, found the following in regard to Mr. Stanley's blurred and double vision:

3. Plaintiff developed double vision and blurred vision following the accident. These were the result of a condition separate and apart from the loss of visual acuity in his right eye.

. . .

6. Dr. Hurwitz also found that plaintiff had sustained damage to the nerves and muscles in the orbit of his right eye which had resulted in limitation of motion of the eye. The right eye was unable to move in unison with the left and could not move as far in any direction as the left eye. This resulted in misalignment of his gaze and the double vision and blurred vision he had complained of.

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**Stanley v. Gore Brothers**

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Based on these findings, Deputy Commissioner Scott concluded:

As a result of the injury by accident giving rise to this claim, plaintiff has sustained permanent damage to the nerves and muscles in the orbit of his right eye, which is an important part of the body, for which he is entitled to compensation in the amount of \$8,000. G.S. 97-31(24).

With regard to this award, Gore Brothers first contends that "that portion of Finding of Fact 3 which concludes that plaintiff's double and blurred vision was 'the result of a condition separate and apart from the loss of visual acuity in his right eye' (for which plaintiff has already been paid permanent disability benefits), is without evidentiary support of record" because among the problems Dr. Butler considered in arriving at his 41.5% permanent partial disability rating was the double or blurred vision upon which the Commission's \$8,000 award is based. Our review of the record reveals that at the time the Deputy Commissioner considered Dr. Butler's findings, the Deputy Commissioner did not address the problem of blurred and double vision, of impaired movement of the eye resulting from damaged nerves and muscles, or the inability of Mr. Stanley's eyes to move in unison. Indeed, Dr. Hurwitz testified that the blurred and double vision did not result from damage to the eye, but rather resulted from damage to the bones, muscles and nerves of Mr. Stanley's face:

Q. Then it's not an internal eye problem nor, in your opinion, is it due to whatever brain damage he had from this accident?

A. No, in my opinion, this is due to the injury that he sustained to the face and the orbit, the bone around the eye. You see, the eye sits in the front of a bony triangle. This is your bony triangle. You've got your eye in front. Running through the back of this bony triangle are holes and slits through which nerves go and connect the muscles which go to the eye. You get damage to that part of the face, and this bone fractures and breaks and moves in, it can either cut, tear or damage the nerves or damage the muscles.

So, I think that's where the injury occurred. I don't think it's due to brain injury, and *I don't think it's due to internal injury to the eye.*



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McCracken v. Anderson Chevrolet-Olds, Inc.

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As further evidence that the visual acuity in Mr. Stanley's eye and his double and blurred vision were two separate injuries, Dr. Hurwitz suggested that the problem of blurred and double vision could be alleviated by the covering of one eye as this would eliminate the second or "double" image. As Mr. Stanley suggests in his brief, "Obviously, visual acuity in an eye will not be altered in any way by the covering of one or the other of the eyes." Consequently, we conclude that the award for Mr. Stanley's blurred and double vision was properly made under G.S. 97-31(24) as a result of damage to an important part of the body—the bones, nerves and muscles in the orbit of Mr. Stanley's right eye.

## VII

Based on the foregoing, the opinion and award of the Commission from which the parties appeal is affirmed. The cost of preparing the record on appeal is to be borne equally by both parties; all other costs are to be borne by the party incurring them.

Affirmed.

Judges ARNOLD and WELLS concur.

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JOHN McCracken v. ANDERSON CHEVROLET-OLDS, INC.

No. 8630SC94

(Filed 19 August 1986)

**1. Automobiles and Other Vehicles § 6.5— false odometer statement—civil liability—proof required**

To make out a *prima facie* case for private enforcement of the Vehicle Mileage Act through a civil action, a plaintiff must establish a violation of a requirement under the Vehicle Mileage Act that was made with intent to defraud. Proof that the defendant knowingly gave a false mileage statement may be made by showing that the transferor actually knew the odometer was incorrect and failed to indicate that the true mileage was unknown, or by demonstrating that the transferor had constructive knowledge that the odometer was incorrect. Proof by constructive knowledge does not preclude a finding of intent to defraud; plaintiff need only present evidence that the transferor's actions toward determining true mileage were grossly negligent or that the transferor recklessly disregarded indications that the odometer was inaccurate. N.C.G.S. § 20-348, N.C.G.S. § 20-347.

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**McCracken v. Anderson Chevrolet-Olds, Inc.**

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**2. Automobiles and Other Vehicles § 6.5— action for false odometer statement—evidence insufficient**

The trial court erred by failing to direct a verdict in favor of defendant in an action in which plaintiff alleged that defendant had violated the odometer disclosure requirements of N.C.G.S. § 20-347 (1983) with the intent to defraud him where it was doubtful that the evidence was sufficient to prove that the car had actually been driven more than the mileage indicated; it was questionable whether the evidence would have been sufficient to go to the jury on a negligence standard; and there was no evidence that defendant was grossly negligent, recklessly disregarded indications that the odometer reading was inaccurate or in any way demonstrated the intent to defraud.

APPEAL by defendant from *Sitton, Judge*. Judgment entered 29 September 1985 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 10 June 1986.

*No brief was filed on behalf of plaintiff appellee.*

*Morris, Golding, Phillips & Cloninger, by James N. Golding and Thomas R. Bell, Jr., for defendant appellant.*

*Johnson, Gamble, Hearn & Vinegar, by Samuel H. Johnson and Richard J. Vinegar, filed a brief as amicus curiae for North Carolina Automobile Dealers Association.*

BECTON, Judge.

John McCracken sued Anderson Chevrolet-Olds, Inc. (Anderson) for damages arising out of his purchase of a diesel-engine 1981 Oldsmobile Cutlass. McCracken claimed that Anderson violated the odometer disclosure requirements of N.C. Gen. Stat. Sec. 20-347 (1983) with the intent to defraud him. He sought treble damages and attorney's fees under N.C. Gen. Stat. Sec. 20-348(a) (1983). After accepting a \$3,000 jury verdict, the trial court trebled the damages and entered judgment against Anderson for \$9,000 plus \$800 in attorney's fees.

On appeal, Anderson argues that the trial court committed reversible error in failing to grant its motions for a directed verdict and judgment notwithstanding the verdict because (1) McCracken failed to establish grossly negligent or reckless conduct on the part of Anderson, and (2) even if the standard were negligence, there was insufficient evidence of negligence to go to the jury. Anderson also contends the court erred in (3) allowing a lay witness to give an expert opinion; (4) allowing McCracken to

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McCracken v. Anderson Chevrolet-Olds, Inc.

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establish damages with hearsay evidence; (5) instructing the jury on incidental damages; and (6) instructing the jury on the standards for reasonable care and constructive knowledge. McCracken did not file a brief on appeal. The North Carolina Automobile Dealers Association filed a brief as *amicus curiae*, urging us to reverse the trial court.

We hold that in order to establish liability under G.S. Secs. 20-347 and -348 the plaintiff must show (1) that the seller had either actual or constructive knowledge that the odometer was materially incorrect, and (2) that the seller acted with gross negligence or recklessness. The trial court erroneously instructed the jury that liability could be imposed if it found that Anderson had made a false representation of the odometer reading, and that Anderson "knew that it was false, or in the exercise of reasonable care, should have known that it was false." The court erred in failing to instruct the jury that a finding of intent to defraud required more than mere negligence; it should have instructed the jury on gross negligence and recklessness. And because the facts in this case, taken in a light most favorable to McCracken, fail to raise more than a suspicion of gross negligence or recklessness, the court erred in failing to direct the verdict in favor of defendant. The judgment of the trial court is reversed. We do not address Anderson's remaining arguments.

## I

Any party who transfers ownership of a motor vehicle in this State must comply with the written disclosure requirements in G.S. Sec. 20-347(a). The transferor must provide:

(1) The odometer reading at the time of the transfer;

.....

(5) A statement that the mileage is unknown if the transferor knows the odometer reading differs from the number of miles the vehicle has actually traveled, and that the difference is greater than that caused by odometer calibration error;

(6) A statement describing each known alteration of the odometer reading, including date, person making the alteration, and approximate number of miles removed by the alteration; and

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**McCracken v. Anderson Chevrolet-Olds, Inc.**

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(7) Disclosure of excess mileage when vehicle is known to have exceeded 100,000 miles and the odometer records only five whole-mile digits.

The statute declares it unlawful for any transferor "to violate any rules under this section or to knowingly give a false statement to a transferee in making any disclosure required by such rules." G.S. Sec. 20-347(c). Violation of this statute may be enjoined as an unfair and deceptive trade practice or punished as a misdemeanor. N.C. Gen. Stat. Sec. 20-349, -350 (1983).

The legislature also provided for private enforcement through civil actions under G.S. Sec. 20-348, which states in part:

(a) Any person who, with intent to defraud, violates any requirement imposed under this Article shall be liable in an amount equal to the sum of:

- (1) Three times the amount of actual damages sustained or one thousand five hundred dollars (\$1,500), whichever is the greater; and
- (2) In the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney fees as determined by the court.

The statutes quoted above are substantially the same as their federal counterparts, 15 U.S.C.A. Secs. 1988 and 1989 (1982).

[1] To make out a *prima facie* case under G.S. Sec. 20-348(a), a plaintiff must establish (1) a violation of a requirement imposed under Article 15 (Vehicle Mileage Act) (2) that was made with the intent to defraud. We will examine these elements separately.

A

If the plaintiff attempts to satisfy the first element by demonstrating that the defendant, in transferring a vehicle, knowingly gave a false mileage statement, the plaintiff may succeed on this element in either of two ways. First, proof that the transferor actually knew the odometer was incorrect and failed to indicate that true mileage was unknown will satisfy this first element. The second method is to demonstrate that the transferor had constructive knowledge that the odometer was incorrect.

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**McCracken v. Anderson Chevrolet-Olds, Inc.**

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Constructive knowledge is established upon proof that the transferor either (a) recklessly disregarded indications that it was incorrect, *Duffer v. Royal Dodge, Inc.*, 51 N.C. App. 129, 131, 275 S.E. 2d 206, 208 (1981) (citing *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381 (D. Neb. 1977), *aff'd*, 578 F. 2d 721 (8th Cir. 1978)), or (b) in the exercise of reasonable care, should have known the odometer was incorrect, *Levine v. Parks Chevrolet, Inc.*, 76 N.C. App. 44, 331 S.E. 2d 747 (relying primarily on *Nieto v. Pence*, 578 F. 2d 640 (5th Cir. 1978) and *Tusa v. Omaha Auto Auction, Inc.*, 712 F. 2d 1248 (8th Cir. 1983)), *disc. rev. denied*, 315 N.C. 184, 337 S.E. 2d 858 (1985). The policy behind this statutory standard is explained in *Duffer*, 51 N.C. App. at 132, 275 S.E. 2d at 208:

The intent of the legislature is to impose an affirmative duty on dealers to detect odometer irregularities. [*Jones v. Fenton Ford, Inc.*, 427 F. Supp. 1328 (D. Conn. 1977).]

Dealer has the duty to state that actual mileage is unknown, even if he lacks actual knowledge that the odometer is incorrect, where in exercise of reasonable care he would have reason to know that the odometer reading is incorrect. *Nieto v. Pence*, 578 F. 2d 640 (5th Cir. 1978).

The language in some cases that discusses the standard of reasonable care applies to proof of constructive knowledge—one way to establish the first element of a case under G.S. Sec. 20-348(a). For example, in *Levine*, the court held that the evidence was sufficient to demonstrate negligence (that the transferor should have known the odometer was inaccurate by nearly 100,000 miles) and, in addition, that the transferor acted with the intent to defraud. The evidence showed that the dealer “had some question as to the verity of the odometer mileage,” yet did little to confirm this suspicion. 76 N.C. App. at 51, 331 S.E. 2d at 751. We agree that this, in combination with the other evidence in *Levine*, was sufficient to support liability under G.S. Sec. 20-348(a).

B

The second element of an action under G.S. Sec. 20-348(a) requires a showing by plaintiff that the transferor acted with the intent to defraud the plaintiff. This element is not required in an

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**McCracken v. Anderson Chevrolet-Olds, Inc.**

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action for injunctive relief against a violator, G.S. Sec. 20-349, or to impose misdemeanor criminal penalties, G.S. Sec. 20-350, although both of these statutes also require proof of knowledge by the transferor. There is no dispute that civil liability with treble damages and attorneys' fees requires proof of intent to defraud.

In order to preserve the integrity of the statute and to prevent dealers from shielding themselves from civil liability by "closing their eyes to the truth," the courts of this State do not require *actual* knowledge to prove "intent to defraud." *Duffer*.

The approach taken by the great majority of courts is sensible. If a person violates an odometer disclosure requirement with actual knowledge that he is committing a violation, a fact finder can reasonably infer that the violation was committed with an intent to defraud a purchaser. Likewise, if a person lacks knowledge that an odometer disclosure statement is false only because he displays a reckless disregard for the truth, a fact finder can reasonably infer that the violation was committed with an intent to defraud a purchaser. The inference of an intent to defraud is no less compelling when a person lacks actual knowledge of a false odometer statement only by "clos[ing] his eyes to the truth." *Nieto*, 578 F. 2d at 642.

*Tusa*, 712 F. 2d at 1253-54 (discussing federal decisions).

In other words, the fact that a plaintiff establishes the first element by proving constructive knowledge rather than actual knowledge does not preclude a finding that the transferor acted with the "intent to defraud." The plaintiff need only present evidence that the transferor's actions toward determining true mileage were grossly negligent or that the transferor recklessly disregarded indications that the odometer was inaccurate. *See Duffer*. This may be shown, for example, by the failure to comply with other requirements in Article 15, *see Roberts v. Buffaloe*, 43 N.C. App. 368, 258 S.E. 2d 861 (1979) (failure to affix notice that odometer had been replaced, as required by N.C. Gen. Stat. Sec. 20-346 (1983)), or by circumstances indicating that defendant knew or had good reason to suspect that the mileage reading was incorrect and failed to take obvious steps to confirm his suspicion, *see Levine* (The transferor had some actual suspicion that the

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McCracken v. Anderson Chevrolet-Olds, Inc.

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odometer was wrong, and the odometer read 14,485 while the vehicle obviously had been driven over 100,000 miles.). *See also Tusa v. Omaha Auto Auction, Inc.*, 712 F. 2d 1248 (8th Cir. 1983) (Intent to defraud may be inferred from actual knowledge or reckless disregard for the truth.); *Nieto*.

We reject the proposition that a transferor may be liable for treble damages and attorney fees, under a statute requiring proof of "intent to defraud," upon proof of simple negligence in failing either to ascertain true mileage or to indicate that the mileage is unknown. We recognize that in doubtful situations, it would be easy for a dealer simply to indicate that the true mileage is unknown. Nonetheless, the legislature clearly provided that failure to comply with disclosure requirements *without* the intent to defraud may subject the violator to injunctive and criminal actions, but not to punitive civil actions. *See Lawrence v. Franklin Investment Company*, 468 F. Supp. 499, 502 (D.D.C. 1978).

We cannot delete from the statute the phrase "with intent to defraud." Although knowledge of an incorrect odometer reading may, in some cases, be evidence of gross negligence or recklessness, a mere negligent violation of a disclosure requirement or even a knowing violation cannot support a private cause of action under the statute absent evidence sufficient to demonstrate an intent to defraud. *Accord Hill v. Bergeron Plymouth Chrysler, Inc.*, 456 F. Supp. 417 (E.D. La. 1978); *Hensley v. Lubbock National Bank*, 561 S.W. 2d 885 (Tex. Civ. App. 1978).

## C

Once evidence is presented to demonstrate a violation of the rules or that the transferor knowingly provided a false mileage statement, "it must then be determined whether defendants' violations . . . were made with the intent to defraud." *Roberts*, 43 N.C. App. at 371-72, 258 S.E. 2d at 863. The second element, intent to defraud, requires proof of gross negligence or recklessness toward the duty either to provide accurate mileage information or to indicate that it is unknown. This requirement of at least gross negligence or recklessness is consistent with our cases imposing punitive or treble damages only upon a showing of more than simple negligence. *See Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975); cf. 36 A.L.R. 3d 125, 226-31 (1971 & 1985 Supp.) (citing

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**McCracken v. Anderson Chevrolet-Olds, Inc.**

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cases imposing punitive damages only on proof of more than negligence).

## II

[2] Generally, the jury must weigh the evidence at trial and may draw reasonable inferences therefrom. *See Roberts*. In this case, however, the competent evidence and permissible inferences raise no more than a mere suspicion of gross negligence or recklessness.

Defendant appeals from the denial of its motions for a directed verdict and judgment notwithstanding the verdict. Thus, we consider the evidence in the light most favorable to the plaintiff in determining whether it is sufficient to support a finding of gross negligence or recklessness. *See Duffer*; *see also Atkins v. White Transportation Company*, 224 N.C. 688, 32 S.E. 2d 209 (1944); *Hefner v. Stafford*, 64 N.C. App. 707, 308 S.E. 2d 93 (1983).

The evidence presented at trial, viewed most favorably to McCracken and with all conflicts resolved in his favor, supports the following relevant findings: The 1981 Oldsmobile was originally purchased from defendant by Mr. Able who used it in his tomato-packing business. Able and his wife owned and operated two similar Oldsmobile diesel cars. Because Mr. Able drove more miles than his wife, they periodically switched cars to keep the mileage on each one below its 12,000 warranty limit for as long as possible during the first year of ownership. Able owned the Oldsmobile for fourteen months and used it in mountainous regions of North Carolina, South Carolina and Tennessee. When Able owned and drove the car, he weighed between 250-260 pounds.

When Able's business failed, defendant repossessed the Oldsmobile, cleaned and serviced it, performed a North Carolina safety inspection and gave it a road test. There were no indications from the car's repair orders, records or physical condition that the odometer had been changed, disconnected or modified. The odometer was working and registered slightly more than 19,000 miles. This is a little higher than average for a fourteen-month period.

On 20 May 1986, plaintiff test-drove the Oldsmobile and noticed no problems. He knew it had been repossessed from Able,



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McCracken v. Anderson Chevrolet-Olds, Inc.

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and he called Able to check on the history of the car. On 26 May, he drove the car to Sylva, North Carolina, with defendant's permission, to arrange financing for the car. Upon his return, he purchased the car "as is." Defendant furnished a statement verifying that the mileage on the odometer was correct at slightly over 19,000.

Plaintiff's primary witness was his nephew, Mr. Robinson, who had been selling cars as a secondary line of work for eleven years. Although he had no training, license or professional experience as a mechanic, the court allowed him to give expert opinion testimony on the actual mileage he believed the car had been driven. Robinson had inspected the car and found that the clip for the cruise control cable, which is supposed to keep the cable from vibrating, was detached. The odometer cable was barely screwed in and contained grease, dust and dirt, but it was still working. He had noticed that a big person had used the front seat, and that the brake pedal was worn on the right side. Although the tires that were on the car were not original issue, Robinson testified that a tire brought to the courtroom, which was similar to the tires on the car, had 25,000 to 30,000 miles on it. The front and rear parts of the car had rock chips and needed to be touched up; this indicated to Robinson that the car either had been driven many miles or had been driven on gravel roads.

Robinson also testified that the brakes were worn out at that time, but that the driving Able did in mountainous regions might have placed 25,000 to 30,000 more miles worth of wear on the brakes than ordinary driving would have done. Other evidence showed that brake systems on diesel cars such as this Oldsmobile place more wear on brakes than brake systems in ordinary gasoline engine cars; and diesel car brakes last 10,000 to 60,000 miles, often nearer the lower end when owners "ride the brakes." Nonetheless, Robinson testified that, in his opinion, the car had 50,000 miles on it.

On cross-examination, Robinson testified that it was common for owners of cars that were about to be repossessed to replace the tires with older ones. He also stated that cruise control clips can become detached by themselves (resulting from vibrations) and that diesel engines vibrate more than gasoline engines. One purpose of the cable clips is to prevent cables from becoming un-

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**McCracken v. Anderson Chevrolet-Olds, Inc.**

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screwed as a result of ordinary vibrations, and if they do become unscrewed, grease and dirt would naturally accumulate in the cable.

McCracken introduced as evidence a series of seven repair orders with odometer readings from 15 April 1981 through 5 May 1982 demonstrating that until June 1981 and after September 1981 the car was driven an average of at least several hundred miles each month. The readings showed that from 8 June 1981 to 9 September 1981 the odometer advanced only 278 miles, from 9,533 to 9,811. McCracken's theory is that the odometer must have been disconnected sometime during this period. We believe this constitutes pure speculation. The only evidence as to why the mileage did not increase during these months was that Able simply used the other Oldsmobile he owned, and avoided using the 1981 Oldsmobile involved in this case in order to keep the mileage below the 12,000-mile warranty limit, at least while the car was less than one year old and the other Oldsmobile still had some miles to go within its 12,000-mile warranty limit.

McCracken apparently argued that the grease and dirt in the odometer cable; the loose clip; the worn brake pedal, brakes, and tires; and the paint chips—all taken together prove that the car had been driven more than the 19,000 miles indicated on the odometer and that, therefore, defendant knowingly provided the false mileage reading with the intent to defraud him. We doubt that the evidence was sufficient to prove the car actually had been driven more than the mileage indicated on the odometer. It is questionable whether the evidence would have been sufficient to go to the jury even on a negligence standard. We can find no evidence that defendant was grossly negligent toward or recklessly disregarded indications that the odometer reading was inaccurate, or that defendant in any other way demonstrated the intent to defraud. *See Hill*.

In the cases cited in Part I, *supra*, there was evidence that the defendants either had actual knowledge of and blatantly disregarded false mileage readings, *see, e.g., Duffer; Roberts*; or disregarded extremely obvious indications that the mileage readings were off by substantial amounts, *see, e.g., Levine* (inaccurate by as much as 100,000 miles); *Nieto* (odometer reading was 14,736 on ten-year-old truck). *See Duval* (court did not determine proper

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N.C. State Bar v. Whitted

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standard because evidence showed either actual knowledge or reckless disregard); *see also Kantorczyk v. New Stanton Auto Auction, Inc.*, 433 F. Supp. 889 (W.D. Pa. 1977) (actual mileage 100,000 more than odometer reading). In the case at bar, there is no more than a suspicion that defendant was grossly negligent or recklessly disregarded any indications that the car had been driven more than 19,000 miles in fourteen months.

For the reasons stated above, the judgment of the trial court is reversed. We need not address the other assignments of error.

Reversed.

Judges JOHNSON and COZORT concur.

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THE NORTH CAROLINA STATE BAR v. EARL WHITTED, JR.

No. 8510NCsB1222

(Filed 19 August 1986)

**1. Attorneys at Law § 12— appropriation of client's funds—evidence sufficient**

Findings of fact by the State Bar that defendant had not notified a client of a draft from an insurance company and had endorsed, cashed and appropriated the draft to his own use were supported by clear, cogent and convincing evidence under the whole record test.

**2. Attorneys at Law § 12— conduct involving moral turpitude—appropriation of client's funds**

Findings by the State Bar that an attorney failed to notify a client of an insurance company draft, endorsed the check, and appropriated it for his own use supported a conclusion that he had violated the Code of Professional Responsibility in that he had engaged in conduct involving moral turpitude; the argument that the client ultimately suffered no loss is not dispositive.

**3. Attorneys at Law § 12— multiple clients—conflict of interests**

The State Bar correctly concluded that defendant violated DR 5-105(A) by representing the estates of a passenger and the driver of an automobile in the division of a fund paid by an insurance company where the interests of the claimants were inevitably adverse in that any increase in the share one received from the available fund diminished the available funds on which the other could draw.

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**N.C. State Bar v. Whitted**

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**4. Attorneys at Law § 12— failure to disclose—conflict of interest—supported by evidence**

A conclusion by the State Bar that defendant failed to disclose the possible effect of his multiple representation was supported by clear, cogent and convincing evidence and the findings supported the conclusions that defendant did not give full disclosure of the possible effect of his multiple representation and that the multiple representation was not in a situation in which it was obvious that defendant could represent the interests of both estates.

**5. Attorneys at Law § 12— disbarment—no abuse of discretion**

The hearing committee of the State Bar did not abuse its discretion by disbarring defendant where findings and conclusions that defendant had committed illegal acts involving moral turpitude were upheld on appeal and the discipline imposed was within statutory limits. N.C.G.S. § 84-28(b), (c).

Judge JOHNSON dissenting.

APPEAL by defendant from an Order of Discipline of a Hearing Committee of the North Carolina State Bar. Order entered 6 June 1985. Heard in the Court of Appeals 15 April 1986.

Defendant appeals from an order of disbarment.

*A. Root Edmonson for plaintiff appellee.*

*Hulse & Hulse, by Herbert B. Hulse, and Irving Joyner, for defendant appellant.*

WHICHARD, Judge.

I.

Plaintiff, the North Carolina State Bar, filed a complaint against defendant, a practicing attorney. A hearing was held before a Hearing Committee of the Bar's Disciplinary Hearing Commission. Based upon its findings of fact and conclusions of law, the Committee entered an order of discipline which disbarred defendant.

Defendant appeals, arguing: (1) that findings of fact seven and eight are not supported by clear, cogent and convincing evidence; (2) that these findings do not support the Committee's conclusions of law that he violated the Code of Professional Responsibility; (3) that findings of fact twenty-four, twenty-five and twenty-six do not support the conclusion of law that he violated Disciplinary Rule (hereafter DR) 5-105(A); (4) that finding of fact twenty-seven is not based upon clear, cogent and convincing evidence and does

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N.C. State Bar v. Whitted

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not support the conclusion of law that he violated DR 5-105(C); and (5) that the Committee abused its discretion by ordering that he be disbarred.

We have carefully examined the proceeding, the orders based thereon, and the arguments presented. We find no error or abuse of discretion, and we therefore affirm.

## II.

The Committee found the following facts which are undisputed: Tyrone McCalop was killed while a passenger in an automobile driven by Matt Arthur Moore when the Moore vehicle collided with an automobile driven by Cornelius E. Page. Evelyn Goodman, McCalop's mother, retained defendant, a practicing attorney, to litigate or settle all claims against any persons responsible for the death of her son. Defendant received a med-pay draft from Allstate Insurance Company in the sum of \$2,000.00 payable to himself and to Mrs. Goodman as administratrix of her son's estate.

The Committee then made the following findings to which defendant excepts:

7. Defendant did not notify Mrs. Goodman of the receipt of this draft. Defendant placed the necessary endorsements on the draft and cashed it. Mrs. Goodman did not endorse the draft nor did she authorize Defendant to endorse her signature.

8. Defendant failed to deposit the \$2,000.00 med-pay draft into a trust account. Defendant appropriated the proceeds of this draft to his own use.

The Committee further made the following findings which are undisputed:

24. By letter dated August 16, 1984, the attorney for American Mutual Fire Insurance Company, insurers responsible for payment of claims against Cornelius E. Page, offered to pay its policy limits, \$50,000, to the four occupants of Matt Arthur Moore's automobile if the four occupants could agree on a split of those funds.

25. Upon receipt of this letter, Defendant informed Ms. Goodman. Mrs. Goodman subsequently took Defendant to

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**N.C. State Bar v. Whitted**

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meet with Annie R. Moore, mother of Matt A. Moore. Defendant agreed to represent Annie R. Moore and explained to her that she would not get as large a share of the settlement proceeds as the representatives of the other occupants of the car since her son had been driving.

26. Defendant subsequently got both of his clients, Ms. Goodman and Ms. Moore, to agree to a proposed division of the \$50,000. Ms. Goodman was to receive \$15,333.00 and Ms. Moore \$4,000.00.

Finally, the Committee made the following finding to which defendant excepts:

27. Defendant did not fully disclose the possible effect of his multiple representation on his independent professional judgment on behalf of the McCalop and Moore estates.

Based on these and other findings which are not essential to the arguments presented, the Committee entered the following conclusions of law:

The conduct of Defendant, as set forth above, constitutes grounds for discipline pursuant to N.C.G.S. Sec. 84-28(a) and (b)(2) in that Defendant violated the Disciplinary Rules of the Code of Professional Responsibility as follows:

(a) Both by placing a false endorsement on the \$2,000 med-pay draft from Allstate Insurance Company and by cashing said draft and appropriating the proceeds to his own use, Defendant engaged in illegal conduct involving moral turpitude in violation of [DR] 1-102(A)(3); engaged in conduct involving dishonest[y], fraud, deceit, or misrepresentation in violation of [DR] 1-102(A)(4); and engaged in other professional conduct adversely reflecting on his fitness to practice law in violation of [DR] 1-102(A)(6).

(b) By failing to notify his client of receipt of the \$2,000 med-pay draft from Allstate Insurance Company upon receipt of said draft, Defendant failed to notify his client of receipt of her funds in violation of [DR] 9-102(B)(1).

(c) By failing to account for the \$2,000.00 med-pay draft to his client, Defendant failed to maintain complete rec-

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N.C. State Bar v. Whitted

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ords of all funds of the client and render appropriate accounts to his client regarding them in violation of [DR] 9-102(B)(3).

(d) By failing to pay any portion of the \$2,000.00 med-pay draft to his client when it was received, Defendant failed to promptly pay or deliver to the client as requested by the client the funds in possession of the lawyer which the client was entitled to receive in violation of [DR] 9-102(B)(4).

(e) By failing to maintain a trust account in a North Carolina bank in which to deposit funds of his clients', and by placing his client funds in his general office account, Defendant failed to preserve the identity of all funds of the client paid to the lawyer or law firm in one or more identifiable bank accounts maintained within the state with no funds of the lawyer or law firm deposited therein in violation of [DR] 9-102(A) . . . [.]

(f) By agreeing to represent Mrs. Annie R. Moore in settlement of her wrongful death claim on behalf of her son, Matt Arthur Moore, while representing Mrs. Evelyn Goodman on behalf of her son, Tyrone McCalop, knowing that the interests of both clients in the apportionment of the insurance proceeds conflicted, Defendant failed to decline the proffered employment by Mrs. Annie R. Moore knowing that his independent professional judgment on behalf of his other client, Mrs. Goodman, would be or was likely to be adversely affected by the acceptance of the proffered employment in violation of [DR] 501-5(A).

(g) The above referenced multiple representation was not a situation in which it was obvious that Defendant could represent the interests of both the McCalop and Moore estates as would be permitted by [DR] 5-105(C).

(h) Defendant did not give a full disclosure to Mrs. Goodman of the possible effect of the multiple representation on the exercise of his independent professional judgment as would be required for the multiple representation to be permitted by [DR] 5-105(C).

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N.C. State Bar v. Whitted

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Defendant excepted to all the above conclusions except (e).

III.

[1] Defendant contends that findings of fact seven and eight, *supra*, are not supported by clear, cogent and convincing evidence drawn from the whole record. The standard of proof in attorney discipline and disbarment proceedings is one of "clear, cogent and convincing" evidence. Rules of the North Carolina State Bar, Art. IX, Sec. 14(18). See *In re Palmer*, 296 N.C. 638, 647-48, 252 S.E. 2d 784, 789-90 (1979) (adopting standard); *N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 354, 326 S.E. 2d 320, 323, *cert. denied*, 314 N.C. 117, 332 S.E. 2d 482, *cert. denied*, --- U.S. ---, 88 L.Ed. 2d 338, 106 S.Ct. 385 (1985). "Clear, cogent and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt. . . . It has been defined as 'evidence which should fully convince.'" *Sheffield, supra* (citations omitted).

The standard for judicial review of attorney discipline cases is the "whole record" test. *N.C. State Bar v. DuMont*, 304 N.C. 627, 642, 286 S.E. 2d 89, 98 (1982). "Under the whole record test there must be substantial evidence to support the findings, conclusions and result. . . . The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion." *Id.* at 643, 286 S.E. 2d at 98-99.

Applying the "whole record" test to the contested findings here, we find them supported by clear, cogent and convincing evidence in Mrs. Goodman's testimony. While defendant cites evidence which detracts somewhat from that testimony, this evidence does not render the testimony less than "such that a reasonable person might accept as adequate to support a conclusion." *Id.* "The 'whole record' test does not allow the reviewing court to replace the [Committee's] judgment as between two reasonable conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977). These assignments of error are overruled.



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N.C. State Bar v. Whitted

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## IV.

[2] Defendant contends that, even if supported by clear, cogent and convincing evidence, findings seven and eight "do not support the conclusions . . . that he violated the Code of Professional Responsibility with the intent to deprive Mrs. Goodman of \$2,000.00 or to otherwise defraud her." He argues that there is no evidence that Mrs. Goodman suffered any loss as a result of such conduct, and that "[t]hus, it can hardly be said that [his] conduct involved moral turpitude." We disagree.

DR 1-102(A)(3) of the Code of Professional Responsibility, which was in effect at the time of the events at issue,<sup>1</sup> provides that a lawyer shall not engage in illegal conduct involving moral turpitude. Findings seven and eight establish illegal conduct by defendant in making a false or forged endorsement, N.C. Gen. Stat. 14-120, and in converting to his own use a check that came into his possession while exercising a public trust as an attorney, N.C. Gen. Stat. 14-90. Moral turpitude is generally defined as an "act of baseness, vileness, or depravity in private and social duties which man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." Black's Law Dictionary 910 (rev. 5th ed. 1979). See also 7 C.J.S. *Attorney & Client* Sec. 67 at 957-58. Our Supreme Court has used this definition. *Jones v. Brinkley*, 174 N.C. 23, 25, 93 S.E. 372, 373 (1917). The Supreme Court of another state has stated: "The definition of 'turpitude' as anything done 'contrary to justice, honesty, modesty, or good morals' has long been approved by this court." *Marsh v. State Bar of California*, 210 Cal. 303, 307, 291 P. 583, 584 (1930).

We hold that the Committee could conclude that the illegal acts established by the findings here fell within these definitions. Defendant's argument that Mrs. Goodman ultimately suffered no loss from the acts is not dispositive. The acts, when committed, were illegal and could be found to involve moral turpitude. These assignments of error are overruled.

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1. The Code of Professional Responsibility has since been replaced by Rules of Professional Conduct adopted by the North Carolina State Bar on 26 July 1985 and approved by the Supreme Court of North Carolina on 7 October 1985. All references in this opinion are to rules under the prior code, which governs this case.

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N.C. State Bar v. Whitted

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## V.

[3] Defendant contends that findings twenty-four, twenty-five and twenty-six, *supra*, do not support conclusion of law (f), *supra*, that he violated DR 5-105(A). We disagree.

DR 5-105(A) provides: "A lawyer should decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C)." DR 5-105(C) provides that "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

The findings establish that despite his employment to represent Mrs. Goodman in obtaining a settlement from the available \$50,000.00 fund defendant undertook to represent Mrs. Moore in obtaining a settlement from the same fund. The interests of claimants Goodman and Moore were inevitably adverse. Any increase in the share one received from the available fund diminished the available funds from which the other could draw. By agreeing to apportion any of the funds to Mrs. Moore, defendant ineluctably reduced the potential share of Mrs. Goodman. The Committee thus properly could conclude that defendant's independent professional judgment on behalf of Mrs. Goodman would be or was likely to be affected by his acceptance of employment by Mrs. Moore. This assignment of error is overruled.

## VI.

[4] Defendant contends that finding twenty-seven, *supra*, is not based upon clear, cogent and convincing evidence and does not support conclusions of law (g) and (h), *supra*, that his acceptance of Mrs. Moore's employment was not permitted by DR 5-105(C). We disagree.

Mrs. Goodman testified that defendant did not explain anything to her about "a conflict of interest" or "the need to have any settlement fees distributed" or "an agreement between the occupants of the car as to how the money would be distributed." She stated:

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N.C. State Bar v. Whitted

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He never said nothing to me about no conflict, nothing at all. He never talked to me about her [Mrs. Moore]. He just mentioned the fact that we were friends, and . . . he would not charge me as much as he did Mrs. Moore. But as far as her—the case— . . . her case, . . . he never discussed that with me, never talked with me.

She subsequently stated that if defendant “had told me there would be conflict, I would have never let him do it because we [were] friends.” While she understood that there was a single \$50,000.00 fund in which the families of the decedents would share, it was never suggested to her that the more one family received the less the others would.

We hold that the foregoing constituted clear, cogent and convincing evidence, which a reasonable person might accept to support a conclusion, *DuMont*, *supra*, that defendant failed to disclose the possible effect of his multiple representation. This assignment of error is overruled.

We further hold that this finding fully supports conclusion of law (h) that defendant did not give full disclosure to Mrs. Goodman. Conclusion of law (g), that the multiple representation was not a situation in which it was obvious that defendant could represent the interests of both estates, is not dependent on the disputed finding. It is, however, fully supported by the findings and the evidence. These assignments of error are overruled.

## VII.

[5] Defendant finally contends the Committee abused its discretion by ordering him disbarred. The discipline imposed was within the statutory limits. N.C. Gen. Stat. 84-28(b), (c). This Court recently stated that “so long as the punishment imposed is within the limits allowed by the statute this Court does not have the authority to modify or change it.” *N.C. State Bar v. Wilson*, 74 N.C. App. 777, 784, 330 S.E. 2d 280, 284 (1985). It relied on the following from *N.C. State Bar v. DuMont*, 52 N.C. App. 1, 25, 277 S.E. 2d 827, 842 (1981), which was adopted by our Supreme Court in *DuMont*, 304 N.C. at 632, 286 S.E. 2d at 92: “Under the statute, our review is limited to ‘matters of law or legal inference.’ N.C. Gen. Stat. 84-28(h). Under that statute, we do not find authority for this Court to modify or change the discipline ordered by the commission.” The discipline imposed thus is not subject to review.

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NCNB v. Powers

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Assuming, *arguendo*, that we can review the discipline imposed, we decline to find an abuse of discretion. We have upheld the findings and conclusions that defendant committed illegal acts that involved moral turpitude. It was not an abuse of discretion to impose the ultimate sanction of disbarment for such conduct.

Affirmed.

Judge ARNOLD concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

I respectfully dissent from the majority opinion. The majority opinion aptly states the standard of proof in attorney disbarment proceedings. I do not agree that there was clear, cogent, and convincing evidence to support a conclusion that defendant violated all of the disciplinary rules as alleged. After applying the "whole record" test I cannot agree with the majority opinion that defendant's multiple representation violated DR 5-105(A). Moreover, findings of fact twenty-four (24), twenty-five (25), and twenty-six (26) do not support the Commission's conclusion of law that defendant violated DR 5-105(A). The evidence, when considered as a whole, was not substantial so that a reasonable person might accept it as adequate to support the Commission's conclusion that defendant violated DR 5-105(A). I vote to reverse the Commission's conclusion that defendant violated DR 5-105(A) and remand the order of discipline for reconsideration.

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NCNB NATIONAL BANK OF NORTH CAROLINA, TRUSTEE UNDER TRUST  
AGREEMENT OF LOUISE S. FOLEY DATED MARCH 2, 1967 v. HELEN A.  
POWERS, NORTH CAROLINA SECRETARY OF REVENUE

No. 8626SC173

(Filed 19 August 1986)

**Taxation § 18— trust income—distributable to nonresident and resident beneficiaries—calculation of intangibles tax**

A trust is entirely exempt from intangibles taxation under N.C.G.S. § 105-212 only if all of the net income is distributed to nonresidents or if the

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NCNB v. Powers

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only potential beneficiaries are nonresidents; Department of Revenue regulation, 17 NCAC 8.1505, treating net income retained in a trust as "distributable to nonresidents" only to the extent that nonresidents are proportionally represented in the pool of all beneficiaries, does not conflict with the intent or language of the statute.

APPEAL by defendant from *Grist, Judge*. Judgment entered 4 December 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 12 June 1986.

*Robinson, Bradshaw & Hinson, P.A., by Edwin F. Lucas III, for plaintiff appellee.*

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Marilyn R. Mudge, for defendant appellant.*

BECTON, Judge.

North Carolina Secretary of Revenue Helen A. Powers appeals from a trial court judgment ordering an intangibles tax refund to NCNB National Bank of North Carolina as trustee under the trust agreement of Mrs. Louise S. Foley. We reverse the judgment of the trial court.

The only issue on appeal is whether a trust administered by a North Carolina trustee, with both resident and nonresident beneficiaries, is entirely exempt from taxation on intangible personal property when the trustee has the discretion to distribute all the income to the nonresident beneficiaries. We hold that it is not entirely exempt unless all the income is actually distributed to the nonresident beneficiaries.

I

The facts are not in dispute. In 1967, Mrs. Foley created a trust naming seven nonresidents and four residents as beneficiaries. The manner in which the principal and income was to be distributed was left in the sole discretion of the trustee. In 1982, the trustee distributed some of the net income of the intangible trust property to resident beneficiaries, some to nonresidents, and some was retained in the trust. One resident and two nonresident beneficiaries received no distributions. The trustee remitted to the Department of Revenue \$1,261.90 as the 1982 intangibles tax on the trust property. The tax burden for all the intangible personal property in 1982 would have been \$2,054.84; the dif-

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**NCNB v. Powers**

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ference was claimed as an exemption for the nonresident beneficiaries.

On 30 July 1985, the trustee applied for a refund of the entire 1982 intangibles tax paid for the trust, basing its claim on the exemption for nonresidents in N.C. Gen. Stat. Sec. 105-212 (1985). The Secretary of Revenue, applying the formula in 17 NCAC 8.1505, found the proper amount of tax to be \$734.61 and issued a refund of \$527.29 plus interest.

The trustee filed a complaint in superior court to recover the \$734.61 plus interest. The trustee moved for judgment on the pleadings, and the Secretary moved for summary judgment. The trial court granted the trustee's motion, denied summary judgment for the Secretary of Revenue, and ordered the Secretary to refund \$734.61 plus interest to the trustee. The Secretary of Revenue appeals.

## II

Intangible personal property held by a North Carolina trustee may be exempt from taxation under G.S. Sec. 105-212, which provides in part:

If any intangible personal property held or controlled by a fiduciary domiciled in this State is so held or controlled for the benefit of a nonresident or nonresidents, or for the benefit of any organization exempt under this section for the tax imposed by this Article, such intangible personal property shall be partially or wholly exempt from taxation . . . in the ratio which the net income distributed or distributable to such nonresident, nonresidents or organization, derived from such intangible personal property during the calendar year . . . , bears to the entire net income derived from such intangible personal property during such calendar year. . . . No provisions of law shall be construed as exempting trust funds or trust property from the taxes levied by this Article except in the specific cases covered by this section.

Until 1984, the phrase "distributed or distributable" was interpreted by the Department of Revenue to include income (1) actually distributed to nonresidents and (2) income that had been earmarked for a specific nonresident beneficiary by the trustee or by the trust instrument. This narrow interpretation of the exemp-

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NCNB v. Powers

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tion was rejected in *Dickson v. Lynch*, 66 N.C. App. 195, 310 S.E. 2d 404 (1984).

In *Dickson*, a North Carolina trustee administering four discretionary trusts elected to make no distribution. Each trust had only one nonresident beneficiary and no other beneficiaries. After defining "distributable" as "capable of being distributed," we held that the Department of Revenue requirement that income be actually distributed or earmarked for distribution in order to be included in the calculation of the ratio was in conflict with the language and purpose of the statute. Finally, we held, "[b]ecause plaintiff here was authorized to distribute income to nonresidents, and to no one else, the trusts are clearly exempt from the intangibles tax under the plain language of G.S. 105-212." 66 N.C. App. at 196, 310 S.E. 2d at 405.

After the *Dickson* decision, the Secretary of Revenue promulgated new regulations. The paragraph challenged in the case at bar states:

"Net income distributed" shall mean the net income of a trust actually paid to a beneficiary or beneficiaries during the calendar year. "Net income distributable" shall mean the net income which by terms of a trust instrument is required or authorized to be distributed but which has not been distributed. Such income, if required to be distributed, shall be deemed "distributable" to the beneficiary to whom it is required to be distributed. Such income, if authorized to be distributed at the trustee's discretion, shall be deemed "distributable" to the beneficiaries, whether resident, nonresident or exempt organizations, in equal shares, unless the trust instrument provides otherwise.

17 NCAC 8.1505(b). The trustee argues that the last sentence of this regulation conflicts with the clear language in G.S. Sec. 105-212 and the meaning of "distributable" expressly adopted in *Dickson*. We disagree.

A

In *Dickson*, only nonresidents were named as beneficiaries in the trusts; no income was capable of being distributed to residents. The trusts were held by a resident trustee for the sole benefit of nonresidents, whose assets would not otherwise be sub-

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NCNB v. Powers

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ject to a North Carolina intangibles tax. To impose a tax just because all the net income was retained in a trust controlled by a North Carolina trustee would defeat the purpose of the statute. 66 N.C. App. at 196, 310 S.E. 2d at 405.

In contrast to *Dickson*, the case at bar involves a trust held for the benefit of residents and nonresidents. Although all the net income is literally "capable of being distributed" to nonresidents, some was actually distributed to both residents and nonresidents, and some was retained in the trust for the future benefit of both residents and nonresidents. We reject the argument that *Dickson* requires a total exemption for any trust which gives discretion to the trustee to distribute the net income to nonresidents regardless of any actual distribution to residents or the retention of income in the trust. *Dickson* requires only that if all the net income is distributed to nonresidents or if the only potential beneficiaries are nonresidents, the trust is entirely exempt from intangibles taxation under G.S. Sec. 105-212.

## B

We must now determine whether the regulation adopted by the Department of Revenue after the decision in *Dickson* conflicts with the clear intent and purpose of the statute. See *Sale v. Johnson*, 258 N.C. 749, 757, 129 S.E. 2d 465, 469-70 (1963). In so doing, we recognize that "[s]tatutes providing exemption from taxation are strictly construed. . . ." and that, "[o]rdinarily, the interpretation given to the provisions of our tax statutes by the Commissioner of Revenue will be held to be *prima facie* correct and such interpretation will be given due and careful consideration by this Court, though such interpretation is not controlling." *Id.* at 757, 129 S.E. 2d at 470 (quoting *In re Vanderbilt University*, 252 N.C. 743, 114 S.E. 2d 655 (1960) and omitting citations). We also note the admonition in G.S. Sec. 105-212 that no provision of law be construed to exempt trust property from intangibles taxation "except in the specific cases covered by this section."

The Secretary's interpretation of G.S. Sec. 105-212 and the Department of Revenue regulation, 17 NCAC 8.1505, are reasonable and do not conflict with the intent or language of the statute. The purpose in enacting the exemption in 1947 was to assure trust settlors that naming a North Carolina trustee would not subject the interests of the nonresident beneficiaries to an addi-



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NCNB v. Powers

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tional tax burden *just because* the trustee was domiciled in this State. It was not intended "to exempt intangibles theretofore subject to the intangible personal property tax. . . ." *Allen v. Currie*, 254 N.C. 636, 643, 119 S.E. 2d 917, 922-23 (1961); *see Ervin v. Clayton*, 278 N.C. 219, 226, 179 S.E. 2d 353, 357 (1971).

The regulation provides for a total exemption when (1) all the trust income is distributed to nonresidents or (2) the only beneficiaries are nonresidents. This complies with *Dickson*. The regulation provides for partial exemption when (1) there are resident and nonresident beneficiaries and (2) not all the income is distributed to nonresidents. The intangible trust property is exempted in the ratio which net income distributed or "distributable" to nonresidents bears to total net income. Net income that is subject to distribution in the trustee's discretion but is retained in the trust is considered distributable to resident and nonresident beneficiaries in equal shares unless otherwise provided in the trust instrument. This is consistent with the language in G.S. Sec. 105-212 providing for partial exemptions, when appropriate, in the proportion approximating the percentage of the trust benefitting nonresidents. It is also consistent with the purposes of the statute to fairly apportion the tax burden and to avoid imposing a burden on otherwise exempt interests solely because the trustee is domiciled in North Carolina. *See Ervin; Allen*.

In contrast, the trustee's interpretation of G.S. Sec. 105-212 would conflict with the language and purpose of the statute. If, as the trustee contends, an entire trust is exempt from intangibles tax whenever one nonresident is named as a beneficiary who potentially may receive all the net income, property not otherwise exempt would become exempt.

For example, the naming of one nonresident beneficiary, even though excluded from actual distributions, would render the entire trust exempt, even if all the net income were distributed to residents. If this were intended by the legislature, it would not have been necessary to provide for consideration of net income actually "distributed" to nonresidents in the calculation of the exemption ratio.

Furthermore, the language providing for "partial" exemption would have meaning only when the trust instrument specifically prohibits the discretionary distribution of some part of the net in-

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**NCNB v. Powers**

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come to nonresidents. Only if the trust instrument were to limit the percentage or amount of net income distributable to nonresidents would a partial exemption, as opposed to a total exemption, be appropriate. Thus, a trust settlor could easily assure a total exemption by naming one nonresident beneficiary with no written restrictions on the net income distributable to that party. It would be difficult if not impossible to determine whether the nonresident were merely a straw person, thus not justifying any exemption, or an intended beneficiary. We do not believe the legislature intended to allow the use of a nonresident beneficiary to defeat taxation of intangible personal property held in a North Carolina trust.

C

The trustee's alternative interpretation, proposed in a supplemental brief, is also rejected. The trustee suggests that even if net income actually distributed to residents were not considered to be "distributable" to nonresidents, the trust should be exempt from intangibles tax to the extent net income was either distributed to nonresidents or retained in the trust. The Secretary argues that net income retained in the trust that is "distributable" to residents and nonresidents should be considered distributable to nonresidents in the proportion that the number of nonresident beneficiaries bears to the number of all the beneficiaries. In the case at bar, there are seven nonresident beneficiaries and a total of eleven beneficiaries. Thus, the exclusion ratio for the retained net income is 7:11 under the Revenue regulation. The trustee argues that because all of the retained net income was literally "distributable" to any or all of the nonresidents, the exclusion ratio should be 1:1. Unless otherwise provided in the trust instrument, income retained in the trust accumulates for the potential benefit of all beneficiaries. Under the regulation challenged here, if all the beneficiaries were nonresidents, the entire trust would be exempt. If they were all residents, the entire trust would be taxable. If a certain percentage of the beneficiaries were nonresidents, only that percentage of the undistributed income would be considered distributable to the nonresidents. We believe this does not conflict with the intent and purpose of the statute, and, absent language in the trust instrument to the contrary, closely approximates the probable intent of the settlor.

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NCNB v. Powers

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Contrary to the contention of the trustee, the Supreme Court in *Allen* and *Ervin* did not state that the nonresident exemption in G.S. Sec. 105-212 was intended to encourage out-of-state business for North Carolina fiduciaries. Our reading of those cases and the statute itself reveals that the exemption was intended and designed to remove unfair impediments to the selection of North Carolina fiduciaries by trust settlors. But there was no apparent intention to actively encourage the selection of such fiduciaries by allowing them to avoid intangibles taxation on trust property that otherwise would be subject to it. Considering our obligation to construe tax exemptions narrowly, we decline to construe the exemption in G.S. Sec. 105-212 broadly to allow that result. Allowing only a partial exemption in cases such as the one at bar will assure equitable apportionment of the tax burden and will not unduly burden nonresident beneficiaries. More importantly, it will enforce the legislative purpose of the statute.

For the reasons set forth above, the trial court's judgment is reversed. General Statute Section 105-212 does not provide an exemption for all the intangible personal property held in a North Carolina trust whenever the trustee has the discretion to distribute the net income to nonresident beneficiaries, unless there are no named resident beneficiaries. Department of Revenue regulation 17 NCAC 8.1505, treating net income retained in a trust as "distributable to nonresidents" only to the extent that nonresidents are proportionately represented in the pool of all beneficiaries, is upheld. After carefully reviewing the calculation by the Secretary under 17 NCAC 8.1505 of the refund owed the trustee, we conclude that \$527.29 plus interest was the proper amount.

The trial court's judgment is

Reversed.

Judges JOHNSON and COZORT concur.

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**Thorne v. N.C. Dept. of Human Resources**

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JOY M. THORNE, APPELLANT v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, NORTH CAROLINA DIVISION OF SOCIAL SERVICES, APPELLEES

No. 857SC1334

(Filed 19 August 1986)

**Social Security and Public Welfare § 1— AFDC-medically needy assistance calculation of eligibility income—federal and state tax refunds**

The treatment of an income tax refund as a resource in determining AFDC eligibility while treating an income tax refund as income in determining AFDC-medically needy eligibility violates the "same methodology" requirement of 42 U.S.C. Sec. 1396a(a)(10)(C)(i)(III), the federal Medicaid statute. N.C.G.S. § 108-51, 10 N.C.A.C. 49B .0307(d)(1).

APPEAL by petitioner from *Stephens, Judge*. Judgment entered 16 September 1985 in Superior Court, WILSON County. Heard in the Court of Appeals 9 April 1986.

*Attorney General Lacy H. Thornburg by Associate Attorney General Cathy J. Rosenthal for the appellee.*

*Eastern Carolina Legal Services, Inc. by David H. Harris, Jr., and N. C. Legal Services Resource Center, Inc., by Pam Silberman, for petitioner appellant.*

COZORT, Judge.

Petitioner applied for Aid to Families with Dependent Children (hereinafter referred to as AFDC) medically needy assistance. The Wilson County Department of Social Services (hereinafter referred to as DSS) calculated petitioner's eligibility income, including therein her federal and state income tax refunds. Under the North Carolina AFDC program, an income tax refund is considered as a resource, not as income, in determining AFDC eligibility. The question presented by this appeal is whether treatment of an income tax refund as income in determining eligibility of an *AFDC-medically needy applicant* while treating an income tax refund as a resource in determining eligibility of an *AFDC applicant* violates the federal Medicaid statute. We hold that it does.

The facts of this case are not in dispute. Petitioner Joy M. Thorne applied for Medicaid on 17 April 1984. Ms. Thorne, at the

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**Thorne v. N.C. Dept. of Human Resources**

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time of the administrative proceeding below, was a single head of household responsible for raising two minor children. She worked at the local Blue Bell Factory in Wilson, North Carolina. Ms. Thorne received income of \$400-\$500 per month from Blue Bell and \$190 in Social Security benefits for her children. In February of 1984, Ms. Thorne's oldest child was shot in the eye and severely injured. The child required extensive medical treatment, including four operations. Because of these medical needs, petitioner applied for retroactive medical assistance pursuant to the Aid to Families with Dependent Children—Medically Needy program. She was found eligible for AFDC-medically needy benefits, but was required to "spend-down" \$1,356.88 in medical expenses before she could receive any benefits. The \$1,356.88 "spend-down" was calculated by determining the amount of income Ms. Thorne had and then subtracting from that amount the AFDC-medically needy income eligibility limit. When calculating petitioner's income, the Wilson County DSS included a federal tax refund of \$665.00 and a state tax refund of \$71.00.

The petitioner appealed the Wilson County DSS's decision contending that her federal and state income tax refund should not have been considered as income but should have been considered a resource (not included in determining amount of spend-down). The DSS decision was upheld at all administrative levels, including the North Carolina Department of Human Resources. After exhausting all her administrative remedies, Ms. Thorne petitioned the Superior Court of Wilson County for judicial review, requesting the superior court to reverse and modify the decision of the Department of Human Resources. The superior court affirmed the decision of the North Carolina Department of Human Resources upholding the designation of petitioner's income tax refund as income in determining AFDC-medically needy eligibility.

The sole issue presented by this appeal is whether the treatment of income tax refunds as income in determining AFDC-medically needy eligibility while at the same time treating income tax refunds as a resource in determining AFDC eligibility violates the requirements of the federal Medicaid statute. For the reasons set forth below we hold such disparate treatment violates the federal Medicaid statute.

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**Thorne v. N.C. Dept. of Human Resources**

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The Medicaid program is a cooperative, cost-sharing program between federal and state governments which " 'provid[es] federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons.' " *Schweiker v. Gray Panthers*, 453 U.S. 34, 36, 69 L.Ed. 2d 460, 465, 101 S.Ct. 2633, 2636 (1981), *quoting Harris v. McRae*, 448 U.S. 297, 301, 65 L.Ed. 2d 784, 100 S.Ct. 2671, 2680 (1980). Participation in the program is optional; however, once the State opts to participate, it must develop a plan which complies with federal law. *Harris v. McRae*, *supra*. There are two classes of eligible persons under Medicaid: the "categorically needy" and the "medically needy." The "categorically needy" are those persons eligible for cash assistance under (1) the AFDC program, 42 U.S.C. Sec. 601, *et seq.*, or (2) the Supplemental Security Income program (SSI), 42 U.S.C. Sec. 1381, *et seq.* The "medically needy" are those persons who meet the nonfinancial eligibility requirements for AFDC or SSI, but whose income or resources exceed the financial eligibility requirements of the relevant program. The "medically needy" qualify for assistance because their income and resources are insufficient to pay for necessary medical care. This appeal concerns a person who, but for income or resources, would qualify for AFDC; she is known as "AFDC-medically needy."

Providing coverage for the medically needy is optional for states electing to participate in the Medicaid program. 42 U.S.C. Sec. 1396a(a)(10)(C). North Carolina has opted to provide coverage to the medically needy. G.S. 108-51. Having opted to provide benefits to both AFDC and AFDC-medically needy, the State must use the same eligibility standards for each group. 42 U.S.C. Sec. 1396a(a)(10)(C)(i)(III); *Morris v. Morrow*, 783 F. 2d 454 (4th Cir. 1986). A regulation promulgated by the Secretary of the Department of Health and Human Services ("Secretary") in 1986 requires states to treat income tax refunds as a resource in determining eligibility under the AFDC program. 51 Fed. Reg. 9205. Prior to this regulation a state could treat an income tax refund as income or a resource in computing eligibility under the AFDC program. North Carolina treated an income tax refund as a resource when determining eligibility under the AFDC program but treated an income tax refund as income when determining eligibility under the AFDC-medically needy program. 10 N.C.A.C. 49B .0307(d)(1).

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Thorne v. N.C. Dept. of Human Resources

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The statutory section at issue here, 42 U.S.C. Sec. 1396a(a)(10)(C)(i)(III) requires the State to use a "single standard" in determining income and resource eligibility for all Medicaid groups and to use the "same methodology" in determining the eligibility of AFDC-medically needy as it uses in determining AFDC eligibility. That section provides that if a state plan allows assistance for the medically needy,

the plan must include a description of (I) . . . (II) . . . (III) the single standard to be employed in determining income and resource eligibility for all such groups, and the methodology to be employed in determining such eligibility, which shall be the *same methodology* which would be employed under the supplemental security income program in the case of groups consisting of aged, blind, or disabled individuals in a State in which such program is in effect, and which shall be the *same methodology* which would be employed under the appropriate State plan . . . to which such group is most closely categorically related . . . . (Emphasis added.)

42 U.S.C. Sec. 1396a(a)(10)(C)(i)(III). Thus, we must determine whether the disparate categorization of an income tax refund in determining AFDC and AFDC-medically needy eligibility violates the "same methodology" requirement of 42 U.S.C. Sec. 1396a(a)(10)(C)(i)(III).

The statutory scheme at issue has been described as "a statute of unparalleled complexity," *DeJesus v. Perales*, 770 F. 2d 316, 321 (2d Cir. 1985), and "'almost unintelligible to the uninitiated,'" *Schwieker, supra*, at 469, *quoting Friedman v. Berger*, 547 F. 2d 724, 727 n. 7 (2d Cir. 1976); however, the language of Sec. 1396a(a)(10)(C)(i)(III) clearly requires the same methodology be used by a state for computation of Medicaid eligibility of AFDC applicants as for AFDC-medically needy applicants. There is no indication in the language "shall be the same methodology" that any leeway exists to adopt a different methodology because of the differences in the AFDC and AFDC-medically needy programs. A review of the legislative history is illuminating.

The original counterpart to the present Sec. 1396a(a)(10)(C)(i) in the 1965 Act was Sec. 1902(a)(10)(B)(i). The original section required states choosing to provide Medicaid to the medically needy to determine the applicant's Medicaid eligibility using "compara-

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**Thorne v. N.C. Dept. of Human Resources**

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ble" criteria to those used to determine eligibility for the related cash assistance program. Pub. L. No. 89-97 Sec. 1902(a)(10)(B)(i), 79 Stat. 286, 345 (1965). The "comparable" standards language which remained in the Act until 1981, was interpreted by the Secretary and the courts to mean that a state was required to treat eligibility criteria for the medically needy in the same way that they were treated for the related cash assistance program. *See, e.g.*, 42 Fed. Reg. 2685 (1977) ("[A]ll aged, blind, and disabled persons . . . must have their eligibility determined using all SSI eligibility rules except for—and only except for—higher dollar amounts for income and resource eligibility levels . . ."); *Caldwell v. Blum*, 621 F. 2d 491, 495-98 (2d Cir. 1980) (state's restrictions on transfer of assets by medically needy impermissible where no such restrictions were imposed on the categorically needy), *cert. denied*, 452 U.S. 909 (1981); *Greklek v. Toia*, 565 F. 2d 1259, 1261 n. 5 (2d Cir. 1977) (State's use of a dual system to determine Medicaid eligibility violates the core statutory and regulatory requirement that AFDC recipients and the AFDC-related medically needy be treated the same with respect to allowable deductions from income), *cert. denied*, 436 U.S. 962 (1978); *Friedman v. Berger*, 547 F. 2d 724, 728 (2d Cir. 1976) (income disregarded in allowing SSI eligibility must likewise be disregarded in determining eligibility of SSI—related medically needy), *cert. denied*, 430 U.S. 984 (1977).

The Omnibus Budget Reconciliation Act of 1981 (OBRA) Pub. L. No. 97-35 Sec. 2171(a)(3), 95 Stat. 807 replaced 1902(a)(10)(B)(i) as amended by Sec. 1396a(a)(10)(C)(i) with a much less complex provision. The OBRA required only that state Medicaid plans for the medically needy "include a description of . . . the criteria for determining eligibility of individuals in the [medically needy] group for medical assistance." Pub. L. No. 97-35, Sec. 2171(a)(3)(i), 95 Stat. 807. The Secretary interpreted this change as allowing states to use different methodologies for treating income and resources in determining eligibility for medically needy and categorically needy. *DeJesus, supra*, at 325. The regulations promulgated by the Secretary stated the following:

Treatment of Income and Resources

1. *Provisions*: States are no longer required to apply a uniform methodology for treating income and resources in such matters as deemed income, interest, court-ordered



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Thorne v. N.C. Dept. of Human Resources

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support payments, and infrequent and irregular income. Rather, the State plan must specify the methodology that will be used; and that methodology must be reasonable.

2. *Discussion:* Before the 1981 Amendments, the methodology for treatment of income and resources of the medically needy depended on the individuals' relationship to a specific cash assistance program. For example, the methodology for deeming the income of medically needy aged, blind, and disabled was taken from the SSI program. This was based on the former wording of section 1902(a)(10) of the Act that described the medically needy, in part, as individuals who "except for income and resources" would be eligible for cash assistance and for Medicaid as categorically needy. . . .

Section 2171 of the 1981 Amendments revised the Medicaid statute so that the direct linkage between the cash assistance program is no longer explicit. . . . Therefore, we have concluded that the State need not adopt the methodology of a related cash assistance program in treating income and resources of the medically needy. . . .

Medicaid Program; Medicaid Eligibility and Coverage Criteria, 46 Fed. Reg. 47976, 47980.

In response to the Secretary's regulations Congress enacted the present "same methodology" requirement of 42 U.S.C. Sec. 1396a(a)(10)(C)(i)(III). See Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, Sec. 137(a)(8), 96 Stat. 324, 378. That section explicitly states that the methodology used by the states shall be the same methodology which would be employed under the related cash assistance program. *Id.* The legislative history of the current provision clearly demonstrates that the "same methodology" language of Sec. 1396a(a)(10)(C)(i)(III) requires states to use the same methodologies in determining such matters as income, interest, court-ordered support payments, and infrequent and irregular income in the AFDC-medically needy program as it uses in the AFDC program. *DeJesus, supra*, at 326.

In 1984, Congress imposed a moratorium on disapproving state Medicaid plans that might be inconsistent with the "same

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**Thorne v. N.C. Dept. of Human Resources**

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methodology" requirement. See H. R. Rep. No. 861, 98th Cong., 2d Sess. 1366-67 (1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 2055. Nothing in the moratorium suggests that Sec. 1396a(a)(10)(C)(i)(III) no longer requires the "same methodology" be employed in determining eligibility of the medically needy. Until Congress amends or rescinds Sec. 1396a(a)(10)(C)(i)(III), we will apply that section as it was enacted.

Basic to the determination of Medicaid eligibility is the categorization of an applicant's financial receipts as income or resources. After this categorization is done then the amount of income and resources determined by the categorization is compared to the eligibility standard. A "methodology" is "a body of methods" or "a way, technique or process of or for doing something." *Webster's New Collegiate Dictionary* 747 (9th ed. 1983). In the context of Medicaid, the "methodology" is the means of computing or categorizing what is income and what is a resource. It is clear from the statute that "methodology" refers to the treatment of receipts as income or resources. Thus, whether a certain receipt is considered as income or a resource it must be the same for AFDC applicants as it is for AFDC-medically needy applicants. The statute, its legislative history, and the applicable case law invite no other interpretation.

The Department of Human Resources contends that the State is not required to use the "same methodology" because the "spend-down" requirement is not part of the AFDC program. The Department's argument is misplaced. The spend-down must be based on the "correct" categorization of income and resources. Simply stated, if a receipt is considered as income in the AFDC program, it must be considered as income in the AFDC-medically needy program. Thereafter, the computation of the spend-down is determined by the applicable state and federal legislation. See *DeJesus, supra*.

We hold that the treatment of an income tax refund as a resource in determining AFDC eligibility while treating an income tax refund as income in determining AFDC-medically needy eligibility violates the "same methodology" requirement of the federal Medicaid statute. The order of the superior court is

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State v. Newton

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Reversed and remanded.

Judges BECTON and PHILLIPS concur.

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STATE OF NORTH CAROLINA v. CLYDE NEWTON

No. 859SC1310

(Filed 19 August 1986)

**1. Constitutional Law § 31— assault with deadly weapon—denial of experts—no error**

There was no prejudicial error in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury in the denial of defendant's motion for funds to hire a private investigator, a ballistics expert, and a medical expert where defendant stated that he needed a private investigator to make measurements of the scene in order to determine the location of the defendant, the victim, the gun, and a witness, but the trial court gave defense counsel access to the premises so he could make the measurements himself; and defendant requested a medical expert and ballistics expert in order to refute testimony that the victim was shot with a twelve-gauge shotgun at point-blank range, but defense counsel could educate himself on the likely effects of a point-blank gunshot to adequately cross-examine the State's witnesses. N.C.G.S. § 7A-454, N.C.G.S. § 7A-450(b).

**2. Criminal Law § 98.1— emotional outburst of the victim—no mistrial—no error**

The trial court did not err in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury by denying defendant's motion for a mistrial due to emotional outbursts and contrary answers from the victim during defendant's testimony. The record did not indicate the specific nature of the disturbance during trial and nothing in the record suggested that the trial court abused its discretion.

**3. Criminal Law § 138.21— assault—not especially heinous, atrocious or cruel**

The evidence was insufficient to show that an assault was especially heinous, atrocious or cruel where defendant repeatedly struck his wife in the presence of their daughter, told her to kiss him goodbye, and refused to get help after shooting her with a twelve-gauge shotgun. N.C.G.S. § 15A-1340.4(a)(1).

**4. Criminal Law § 138.24— aggravating factor—physical infirmity—evidence insufficient**

The trial court erred when sentencing defendant for assault with a deadly weapon inflicting serious injury by finding the victim's physical infirmity as an aggravating factor where the victim had previously lost a foot in an accident, walked using a brace, and was overweight. The evidence did not suggest that the victim's handicap increased the likelihood that she would be dragged out of

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**State v. Newton**

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bed and shot by a twelve-gauge shotgun and her doctor testified that her weight enabled her to survive the injury.

**5. Criminal Law § 138.26— aggravating factor—great monetary loss**

The trial court properly found damage causing great monetary loss as an aggravating factor when sentencing defendant for assault based on the economic impact of medical expenses on the victim. N.C.G.S. § 15A-1340.4(a)(1)(m).

**6. Criminal Law § 138.7— assault—sentencing—defendant not denied the right to make a statement**

Defendant was not denied the opportunity permitted by N.C.G.S. § 15A-1334 (1983) to make a statement in his own behalf during sentencing where he made a statement at the sentencing hearing and was only denied the opportunity to speak during a post-trial motion.

Judge ARNOLD concurring in part and dissenting in part.

APPEAL by defendant from *McLelland, Judge*. Judgment entered 22 July 1985 in Superior Court, VANCE County. Heard in the Court of Appeals 3 June 1986.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Francis W. Crawley, for the State.*

*Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Leland Q. Towns, for defendant appellant.*

BECTION, Judge.

From a judgment imposing the twenty-year maximum sentence following his conviction of assault with a deadly weapon with intent to kill inflicting serious injury, defendant appeals seeking a new trial, or at least a new sentencing hearing.

Defendant contends he is entitled to a new trial because the trial court (a) refused to grant him funds to hire an investigator and expert witnesses; and (b) refused to grant a mistrial due to the emotional outbursts of the victim during defendant's testimony. Alternatively, defendant contends he is entitled to a new sentencing hearing because the trial court erroneously found as aggravating factors (a) that the offense was especially heinous, atrocious, or cruel; (b) that the victim was physically infirm; and (c) that the offense involved damage causing great monetary loss. Finally, defendant contends that he was denied the right to speak in his own behalf at the sentencing hearing.

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State v. Newton

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We find no error in the trial, but we remand for a new sentencing hearing because the trial judge erred in finding the three aggravating factors. There was no denial of defendant's right to speak at the sentencing hearing.

## I

The evidence presented by the State and accepted by the jury showed the following. Defendant, Clyde Newton, was married to the victim, Shirley Newton. During the afternoon on the day of the shooting at a store operated by the Newtons, defendant held a loaded pistol to Mrs. Newton's head and told her he was going to kill her.

Later that night at the Newton home, defendant slapped and beat his wife as she lay on her bed. He then threw her across the end of the bed, choked her, and continued to slap her. Defendant then dragged his wife into the den, got his shotgun from the living room, threw her into a chair and placed the barrel of the shotgun against her stomach. Defendant told his wife to kiss him goodbye. When she refused, he pulled the trigger at point-blank range. Defendant would not assist her, but she was eventually able to telephone for help.

Defendant testified that he picked up his shotgun in the den where he had placed it after a hunting trip and pulled the lever to see if it was loaded. The gun discharged and fell onto the floor. Defendant maintained that he was some distance away from his wife when it discharged, that the shooting was an accident, and that he never told Mrs. Newton to kiss him goodbye or hit her.

## II

[1] Defendant first contends the trial court committed prejudicial error in refusing to grant his motion for funds to hire a private investigator, a ballistics expert, and a medical expert. N.C. Gen. Stat. Sec. 7A-454 (1981) provides that the court, in its discretion, may approve a fee for the service of an expert who testifies for an indigent person. Further, under N.C. Gen. Stat. Sec. 7A-450(b) (1981), the State must provide the indigent defendant with necessary expenses of representation. *See also State v. Tatum*, 291 N.C. 73, 299 S.E. 2d 562 (1976). However, there is no constitutional requirement that private investigators or experts always be made available, and these statutes require such assist-

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*State v. Newton*

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ance "only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that the defendant will not receive a fair trial." *State v. Gray*, 292 N.C. 270, 278, 233 S.E. 2d 905, 911 (1977).

Defendant stated that he needed a private investigator to make certain measurements of the scene in order to determine the location of the defendant, the victim, the gun, and the daughter who testified as a witness for the prosecution. A private investigator need not be provided when no unique skill is required or when there is no unduly burdensome time requirement that would prevent defense counsel from adequately conducting the investigation himself. *State v. Parton*, 303 N.C. 55, 277 S.E. 2d 410 (1981). In the case at bar, the trial court gave defense counsel access to the premises so he could make the measurements himself. No more is required on the facts of this case. Furthermore, defendant has failed to demonstrate that a private investigator could materially assist in the preparation of the defense.

Defendant also contends the trial judge abused his discretion in denying his request for a medical expert and a ballistics expert. The State presented testimony that Mrs. Newton was shot with a twelve-gauge shotgun at point-blank range. The defendant requested experts in order to refute this testimony arguing that the powder burns on Mrs. Newton's body were inconclusive and that Mrs. Newton would not have survived had she been shot at point-blank range. The State is not required to furnish a defendant with a particular service merely because the service may be of some benefit. *Parton, Ross v. Moffitt*, 417 U.S. 600, 41 L.Ed. 2d 341, 94 S.Ct. 2437 (1974). In *Gray*, defendant made no showing of the necessity of appointing an expert in serology to cross-examine the State's expert, a chemist, and the court noted, "There are usually other methods by which defense counsel himself, without the use of investigators or experts, can uncover information or educate himself regarding a particular scientific discipline." Defense counsel could educate himself on the likely effects of a point-blank gunshot to adequately cross-examine the State's witness.

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State v. Newton

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## III

[2] Defendant next argues that the trial court erred in denying the motion for a mistrial due to emotional outbursts and contrary answers of Mrs. Newton during the defendant's testimony. N.C. Gen. Stat. Sec. 15A-1061 (1983) provides in part that the judge may declare a mistrial if conduct inside or outside the courtroom results in substantial and irreparable prejudice to the defendant's case. Not every disruptive event occurring during the trial automatically requires the court to declare a mistrial. *State v. Dais*, 22 N.C. App. 379, 209 S.E. 2d 759, *cert. denied*, 285 N.C. 664, 207 S.E. 2d 758 (1974). The record does not indicate the specific nature of the disturbance during the trial. As this Court explained in *State v. Sorrells*, 33 N.C. App. 374, 377, 235 S.E. 2d 70, 72, *cert. denied*, 293 N.C. 257, 237 S.E. 2d 539 (1977):

On appeal, the decision of the trial judge in this regard is entitled to the greatest respect. He is present while the events unfold and is in a position to know far better than the printed record can ever reflect, just how far the jury may have been influenced by the events occurring during the trial and whether it has been possible to erase the prejudicial effect of some emotional outburst. Therefore, unless his ruling is so clearly erroneous so as to amount to a manifest abuse of discretion, it will not be disturbed on appeal.

Nothing in the record before us suggests that the trial court abused its discretion, and its ruling will not be disturbed on appeal.

## IV

We turn now to defendant's challenges to the aggravating factors found at the sentencing hearing. We note initially that the trial court must find each aggravating factor by a preponderance of the evidence. N.C. Gen. Stat. Sec. 15A-1340.4(a) (1983).

## A

[3] Defendant contends the evidence was insufficient to show that the crime was especially heinous, atrocious, or cruel. The standard is "whether the facts of the case disclose excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense*," *State v. Black-*

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State v. Newton

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welder, 309 N.C. 410, 414, 306 S.E. 2d 783, 786 (1983) (emphasis in the original). Whether an offense is especially heinous, atrocious, or cruel depends upon a comparison of the facts of the case with those normally attributable to other like offenses. *State v. Atkins*, 311 N.C. 272, 316 S.E. 2d 306 (1984). The use of the word "especially" by the general assembly was not merely tautological. *State v. Medlin*, 62 N.C. App. 251, 302 S.E. 2d 483 (1983).

The State contends that defendant's acts of repeatedly striking his wife in the presence of their daughter, telling her to kiss him goodbye, and his refusal to get help for his injured wife indicate excessive violence and psychological suffering. Although these acts are brutal, we cannot say they represent brutality beyond that found in other assaults with a deadly weapon with intent to kill inflicting serious injury. Evidence necessary to prove elements of the offense cannot be used to prove any aggravating factor. G.S. Sec. 15A-1340.4(a)(1). Defendant's acts of hitting and choking his wife and the shooting were used to prove the offense. The evidence that defendant said "kiss me goodbye" and told the victim he would kill her prior to the shooting is insufficient to sustain a finding of the aggravating factor. *See State v. Thompson*, 66 N.C. App. 679, 312 S.E. 2d 212 (1984) (defendant twice telling victim he intended to kill him prior to the shooting was not so unusual in connection with assault with a deadly weapon inflicting serious injury to establish the offense was especially atrocious). Nor is the evidence of Mrs. Newton's extensive medical treatment and hospitalization so unusual in connection with this type of assault to justify applying the factor. Serious injury is an element of this offense and may not be used to prove the aggravating factor. *State v. Hammonds*, 61 N.C. App. 615, 301 S.E. 2d 457 (1983).

In short, the trial court erred in finding that the offense was especially heinous, atrocious or cruel.

B

[4] We also reject the trial court's finding that Mrs. Newton's physical infirmity was an aggravating factor. Although G.S. 15A-1340.4(a)(1)(j) provides that extreme youth, old age, or physical infirmity may be found to be an aggravating factor, this factor should not be found unless it appears the defendant took advantage of the victim's relative helplessness to commit the crime or



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State v. Newton

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that age or infirmity increased the resultant harm. *State v. Rivers*, 64 N.C. App. 554, 307 S.E. 2d 588 (1983). The State argues that because Mrs. Newton previously lost her foot in an accident, walked using a brace, and was overweight, she was less able to flee or fend off the attack. In *Rivers* we held this factor was improperly found when defendant did not take advantage of the victim's advanced age and helplessness when he shot him with a .22 rifle. The evidence does not suggest Mrs. Newton's handicap increased the likelihood she would be dragged out of bed and shot by a twelve-gauge shotgun. The consequences of the injury were less severe rather than worsened because she was overweight. Mrs. Newton's doctor testified her weight enabled her to survive the injury.

## C

[5] Next, defendant contends that the trial court improperly found "damage causing great monetary loss" as an aggravating factor justifying an increased sentence. Defendant argues that G.S. 15A-1340.4(a)(1)(m) should not apply to the economic impact of medical expenses on the victim when evidence of infliction of serious injury is already an element of the offense. This issue is presently before the Supreme Court after a split decision in *State v. Bryant*, 80 N.C. App. 63, 341 S.E. 2d 358 (1986) (Eagles, J., dissenting); see also *State v. Sowell*, 80 N.C. App. 465, 342 S.E. 2d 541 (1986) (Becton, J., dissenting). Although Judge Eagles' analysis in his dissent in *Bryant* is well-reasoned, we are bound by the majority opinion in *Bryant*. Consequently, we are compelled to find no error in the trial court's finding of "damage causing great monetary loss." On remand, the trial court may have the benefit of a Supreme Court ruling in *Bryant* or *Sowell* finally resolving this issue.

## D

[6] Defendant's final contention, that he was denied the opportunity permitted by N.C. Gen. Stat. Sec. 15A-1334 (1983) to make a statement in his own behalf during his sentencing hearing, is without merit. Defendant made a statement at his sentencing hearing, and was only denied the opportunity to speak during the post-trial motion after the sentence was imposed.

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**Reeves v. B&P Motor Lines, Inc.**

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**V**

For the reasons set forth above, we find no error at trial, but remand for a new sentencing hearing.

Judge ARNOLD concurs in part and dissents in part.

Judge WELLS concurs.

Judge ARNOLD concurring in part and dissenting in part.

I dissent only to the majority's holding that it was error to find that the offense here was especially heinous, atrocious and cruel. Under the standard set out in *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983), I would find no error in the trial court's finding that the crime was especially heinous, atrocious and cruel.

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BURDER REEVES, BETTY ANN REEVES, AND WELLS TRANSPORT, INC. v.  
B&P MOTOR LINES, INC., AND CAROLINA CASUALTY INSURANCE  
COMPANY OF FLORIDA

No. 8528SC916

(Filed 19 August 1986)

**Insurance § 90— truck—bob-tail insurance applicable**

The trial court erred by granting summary judgment for defendants where Reeves had been involved in a traffic accident with a truck which had been leased by Wells to B&P; Wells paid B&P for "bob-tail" insurance; Wells and B&P had cancelled the lease; the driver of the truck planned to buy it from Wells; and the accident occurred while he was driving it to his home. The "bob-tail" insurance endorsement excluded coverage whenever the lessor was in the business of the lessee and afforded coverage at all other times, with three explicit exceptions; it was uncontroverted that the driver was not in the business of B&P at the time of the accident and it was clear that the non-trucking use endorsement remained in effect and independent of the cancellation of the lease agreement.

Judge PARKER concurs in the result.

APPEAL by plaintiffs from *Gaines, Judge*. Judgment entered 1 May 1985 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 16 January 1986.

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Reeves v. B&P Motor Lines, Inc.

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*Reynolds & Stewart, by G. Crawford Rippy, III, for plaintiffs appellants.*

*Morris, Golding, Phillips & Cloninger, by James N. Golding, for defendant appellee.*

BECTION, Judge.

I

Plaintiffs appellants Burder and Betty Ann Reeves (the Reeves) and Wells Transport Company (Wells) brought a breach of contract action against defendant appellees B&P Motor Lines, Inc. (B&P) and Carolina Casualty Insurance Company of Florida (Carolina Casualty), seeking to recover on an insurance policy issued to B&P by Carolina Casualty.

By written agreement executed on 9 February 1981, Wells leased a 1967 Kenworth Truck (Unit 211) to B&P. Ralph Capps was the regular driver of Unit 211 for Wells. B&P paid Wells for "runs," and Wells would in turn pay its driver, Capps. Wells paid B&P eighteen dollars per month for "bob-tail" insurance. B&P deducted the eighteen dollars from its monthly settlement with Wells and added Wells to the fleet insurance policy it maintained with Carolina Casualty.

On the morning of 27 May 1982, Wells and B&P decided to cancel the lease agreement between them. Wells returned the license plates, certificate of authority, I.C.C. permits, decals and certificate of insurance pertaining to Unit 211 to B&P. At this time, Unit 211 was located on Wells' premises in Forest City, North Carolina. Capps and Eric Wells, President of Wells Transport, spent the day doing repairs to Unit 211, which Capps was planning to purchase from Wells.

At approximately 5:00 p.m., while driving Unit 211 to his home in Woodfin, North Carolina, Capps was involved in a traffic accident with the Reeves. The Reeves later recovered a judgment against Capps and Wells in the amount of \$12,500.00, but they were unable to collect because both Capps and Wells were judgment proof. The Reeves and Wells then instituted this action against B&P and Carolina Casualty to recover on the insurance policy issued by Carolina Casualty with Wells Transport as a named insured. Both sides moved for summary judgment. By stip-

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**Reeves v. B&P Motor Lines, Inc.**

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ulation of the parties, jury trial was waived, and the parties agreed to allow the trial court to decide the case "based on all of the depositions, adverse examinations, Interrogatories, answers and other pleadings filed in [the] case."

The trial court found that B&P did not breach its lease agreement with Wells because the lease had been cancelled by mutual consent before the accident. The court also found that the insurance policy at issue—which provided insurance for non-trucking use (or "bob-tail"), was still in effect as to Unit 211 until the end of May 1982, but that the trip undertaken by Capps on 27 May 1982, and during which the accident with the Reeves occurred, did not fall within the coverage of the policy. Summary judgment was entered in favor of B&P and Carolina Casualty. The Reeves and Wells appeal, and B&P and Carolina Casualty bring a cross-appeal. We reverse and remand as to Reeves' and Wells' appeal; we reject the cross-appeal.

## II

The Reeves and Wells present one question for our consideration—whether the trial court erred in concluding as a matter of law that the insurance policy which provided "bob-tail" coverage to Wells applied to the 27 May 1982 accident. In their cross-appeal, B&P and Carolina Casualty assign error to the trial court's conclusion that the policy was in effect at the time of the accident.

Because the parties by stipulation waived jury trial and chose to submit the case on the pleadings to the trial court, we are concerned in this appeal with whether the evidence supports the findings of fact and whether the findings of fact in turn support the trial court's conclusions of law, the same standard as for a full and formal bench trial. The findings and conclusions in the instant case suggest that the trial court misinterpreted the insurance policy and therefore erred by granting summary judgment in favor of defendants.

The trial court concluded, "Mr. Capps at the time of the accident . . . was not acting within the course and scope of the business of B&P . . .", and that therefore ". . . plaintiffs are not entitled to recover from the defendants, or either of them." We conclude, based on our analysis in Part III, that the fact that

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Reeves v. B&P Motor Lines, Inc.

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Wells (or its agent, Capps) was not acting within the course and scope of the business of B&P at the time of the accident is precisely why the non-trucking use endorsement of the insurance policy *did* apply to this accident.

## III

Interstate Commerce Commission (I.C.C.) regulations mandate that licensees (like B&P) make certain that their lessors (like Wells) have adequate insurance to operate in interstate commerce. The reason for this requirement is that most lessor-independent contractors (Wells) are not licensed by the I.C.C. and only operate under the authority of a lessee-motor carrier's (B&P) I.C.C. permit. By analogy, we look to the public policy behind I.C.C. regulations, which imposes strict liability on the lessee-motor carrier for injuries to third parties when the lessor-independent contractor is operating in the course and scope of the business of the lessee-motor carrier. That policy is to prevent the motor carrier from avoiding safety standards (and insurance requirements) imposed by I.C.C. regulations by leasing equipment from non-regulated independent contractors. *See Hershberger v. Home Transport Co.*, 103 Ill. App. 3d 348, 431 N.E. 2d 72 (1982). In the same way, by requiring I.C.C. permittees to ensure that their lessors are adequately insured, the state is able to regulate the many independent contractors who might otherwise be able to avoid the constraints of insurance and/or licensing laws, posing great risks to the public safety and welfare.

This is exactly what B&P did in this case. Under the lease agreement, B&P undertook to maintain the insurance coverage which I.C.C. rules and regulations require it to provide—that is, it carried general liability insurance which covered Unit 211 while it was in the course and scope of the business of B&P. *In addition to this general liability coverage*, Wells agreed to pay B&P eighteen dollars per month to maintain “bob-tail” insurance with Carolina Casualty.

A “bob-tail” in trucking parlance is simply a tractor without a trailer. However, for insurance purposes, the term takes on a more complex meaning. Disputes over “bob-tail” insurance coverage in other cases have centered on whether the driver and tractor were “in the business of” the lessee-motor carrier at the time of the accident. If so, “bob-tail” insurance is *not* applicable. A case

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Reeves v. B&P Motor Lines, Inc.

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in point in this jurisdiction is *McLean Trucking Company v. Occidental Fire & Casualty Company of North Carolina and Garland L. Wright*, 72 N.C. App. 285, 324 S.E. 2d 633, *disc. rev. denied*, 313 N.C. 603, 330 S.E. 2d 611 (1985). In *McLean*, the lessee-motor carrier sought to establish that a "bob-tail" policy endorsement afforded coverage to the lessor-independent contractor for claims arising out of an accident occurring after the lessor had returned to the point of origin but before he had reached his own home. We held that the lessor was not "in the business of" the lessee-motor carrier at the time of the accident under the terms of the "bob-tail" endorsements, and that the policy therefore afforded coverage. *McLean*, 72 N.C. App. at 292, 324 S.E. 2d at 637.

The endorsement at issue in this case, like the one in *McLean*, is denominated "Truckmen—Insurance For Non-Trucking Use (Bob-tail only)." It provided, *inter alia*:

2. The insurance does not apply:

- (a) while the automobile is used to carry property in any business;
- (b) while the automobile is being used in the business of any person or organization to whom the automobile is rented;
- (c) while a trailer or semi-trailer is attached to any tractor or truck-tractor described above.

We interpret the plain meaning of this provision, as we did in *McLean*, to *exclude* coverage whenever the lessor is "in the business of" the lessee, and to *afford* coverage at all other times, except those explicitly excluded in (a), (b), and (c). In fact, the appellant-lessee in *McLean* conceded that the *only time* a truckmen's endorsement (bob-tail) affords coverage is when the lessor has returned to the point of origin, discontinued all functions for the lessee, and begun the lessor's own personal endeavors. Brief for Appellant at 9, *McLean*. The only dispute in *McLean* was whether the "point of origin" was the lessee's terminal or the lessor's home.

There is no such dispute in the instant case. It is uncontroverted that Capps was *not* "in the business of" B&P at the time of the accident. It is also clear, and the trial court was cor-

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**Reeves v. B&P Motor Lines, Inc.**

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rect in so ruling, that the non-trucking use endorsement remained in effect until 31 May 1982, independent of the cancellation of the lease agreement between Wells and B&P, because no notice of cancellation from Wells or B&P to Carolina Casualty was received until after the accident. There was a separate contractual relationship between Wells and Carolina Casualty with regard to the "bob-tail" insurance. The cancellation of the lease agreement alone had no bearing on this relationship. Wells was the named insured, and Capps was Wells' agent. Capps was also a named driver for Wells in the policy. Arguably, had Wells, or Capps, embarked on a purely personal frolic and detour from 27 May 1982 at 10:00 a.m. until 12:00 midnight on 31 May 1982 the tractor still would have been covered by the non-trucking use endorsement.

We hold, therefore, that the non-trucking use endorsement included coverage for Capps at the time of the 27 May 1982 accident. To construe the policy otherwise would be to render it meaningless and defeat the purpose that non-trucking use policies are intended to serve. "Bob-tail" insurance applies only in very limited circumstances. For this reason, "bob-tail" premiums are considerably lower than general liability premiums. Lessees, by I.C.C. regulation, must carry sufficient general liability insurance to cover their lessors whenever they are operating "in the business of" the lessee. In order to protect themselves from exposure to liability when their lessors are *not* acting "in the business of" the lessee-motor carriers, the latter require their lessors to purchase non-trucking use or "bob-tail" insurance. Often, but not exclusively, this insurance is maintained by the lessee-motor carrier and charged to the lessor. In fact, it is difficult to see how Carolina Casualty would be able to deny coverage on a policy purchased directly from it by a lessor-independent contractor and involved in a similar accident, because this is precisely the kind of situation for which a non-trucking use endorsement contemplates coverage.

The non-trucking use or "bob-tail" endorsement, as delineated in the provision at issue in this case, is at the very least designed to cover a trailer-less tractor whenever it is not being operated "in the business of" the lessee, or at any other time not otherwise expressly excluded under the insurance contract.

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**Long v. N. C. Finishing Co.**

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The judgment of the trial court is affirmed insofar as the court found the insurance policy to be in effect, and appellees' cross-appeal is rejected. The judgment of the trial court is reversed as to the granting of summary judgment against Reeves and Wells. This cause is remanded to the trial court for entry of judgment in favor of plaintiffs.

Affirmed in part, reversed in part, and remanded.

Judge WHICHARD concurs.

Judge PARKER concurs in the result.

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MATTIE B. LONG, WIDOW OF THOMAS LONG, SR., DECEASED EMPLOYEE, PLAINTIFF-APPELLANT v. NORTH CAROLINA FINISHING COMPANY, EMPLOYER, SELF-INSURED, DEFENDANT-APPELLEE

No. 8610IC146

(Filed 19 August 1986)

**1. Master and Servant § 68.1— asbestosis—application of amended statute**

The Industrial Commission erred in an asbestosis case by applying the provisions of N.C.G.S. § 97-58(a), which limited liability to instances in which disablement or death resulted within two years of the last exposure, rather than the amended provisions of the statute which became effective 1 July 1981 and which limited liability to ten years from the last exposure, where plaintiff died on 11 December 1981 and the claim was filed on 8 January 1982. The amended version of the statute was in effect at the time of plaintiff's death, the time when the right to compensation arose.

**2. Master and Servant § 68.1— asbestosis—injurious exposure—not required under N.C.G.S. § 97-58(a)**

N.C.G.S. § 97-58(a) does not require proof of an injurious exposure as defined in N.C.G.S. § 97-57 because the N.C.G.S. § 97-57 definition is limited by the express language of the statute to determining liability under that statute, and because the purpose of N.C.G.S. § 97-57 is to determine whether there has been sufficient exposure to the hazards of asbestosis to hold the employer liable, while the purpose of N.C.G.S. § 97-58(a) is to limit the time in which the employer is liable.

APPEALS by plaintiff and defendant from Opinion and Award of the North Carolina Industrial Commission entered 17 October 1985. Heard in the Court of Appeals 5 June 1986.



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Long v. N. C. Finishing Co.

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On 8 January 1982 plaintiff filed this claim for workers' compensation benefits alleging that her husband, Thomas Long, Sr. [hereafter Long], was disabled and died from asbestosis which he contracted as a result of exposure to asbestos dust while working for defendant. Based on the evidence presented at a hearing held solely to determine whether plaintiff's claim met the exposure requirements of N.C. Gen. Stats. 97-57, 97-58 and 97-63, the Deputy Commissioner made the following pertinent findings of fact:

1. . . . Thomas Long died 11 December 1981.

. . . .

4. During the . . . period from 1960 to 1966, the deceased spent approximately 25% of his time working with asbestos and being exposed to its dust. Throughout this period, he was exposed to the hazards of asbestos for as much as 30 working days, or parts thereof, within seven consecutive calendar months.

5. . . . During [the period beginning in 1969 and ending 17 January 1972], the deceased was exposed to the dust of asbestos, but he was not exposed to the hazards of asbestos for as much as 30 working days, or parts thereof, within seven consecutive calendar months.

6. . . . The deceased was exposed to asbestos dust but not for as much as 30 working days, or parts thereof, within seven consecutive calendar months during the period from 1972 until the deceased's last day of work on 10 February 1981.

Based on the above findings of fact, the Deputy Commissioner made the following conclusions of law:

1. During the period from 196[0] to 1966, the deceased was injuriously exposed to the hazards of asbestosis, but there was no *injurious exposure* after that period. G.S. 97-57. [Emphasis supplied.]

2. The deceased was exposed to the inhalation of asbestos dust in employment for a period of not less than two years in this State and no part of the two year period was more than 10 years prior to his last exposure to asbestos. G.S. 97-63.

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**Long v. N. C. Finishing Co.**

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3. (However, the alleged disablement of deceased from exposure to asbestos particles occurred more than ten years after the deceased was last injuriously exposed to the hazards of asbestosis and, therefore, more than ten years after his last exposure to the disease of asbestosis. Hence, defendant is not liable for any compensation for alleged asbestosis under G.S. 97-58, the 1981 amendment of which is controlling in this case.)

Plaintiff appealed to the Full Commission. The Commission rejected the Deputy Commissioner's application of the amended version of N.C. Gen. Stat. 97-58(a), which was in effect at the time of Long's death, and applied N.C. Gen. Stat. 97-58(a) as it existed on 10 February 1981, the date of Long's disablement.

The amended version of N.C. Gen. Stat. 97-58(a), effective 1 July 1981, provides, in pertinent part, that "an employer shall not be liable for any compensation for asbestosis unless disablement or death results within 10 years after the last exposure to that disease." (Emphasis supplied.) The earlier version of N.C. Gen. Stat. 97-58(a), in pertinent part, limits an employer's liability for asbestosis to instances in which "disablement or death results within two years after the last exposure to such disease." (Emphasis supplied.)

The Commission found no evidence that Long had been "injuriously exposed to the hazards of asbestos dust" within two years of disablement and denied plaintiff's claim for benefits pursuant to the pre-July 1981 version of N.C. Gen. Stat. 97-58(a).

From the findings and conclusions of the Commission, plaintiff and defendant appealed.

*Ferguson, Stein, Watt, Wallas & Adkins, P.A., by Thomas M. Stern, for plaintiff appellant.*

*Hedrick, Eatman, Gardner & Kincheloe, by J. A. Gardner, III, and Mika Z. Savir, for defendant appellee.*

WHICHARD, Judge.

[1] Plaintiff contends the Commission erred in applying the provisions of N.C. Gen. Stat. 97-58(a) in effect at the time of Long's disablement, as opposed to the amended provisions of the statute which became effective 1 July 1981. We are constrained to agree.

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**Long v. N. C. Finishing Co.**

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The legislature expressly provided that the amended version of N.C. Gen. Stat. 97-58(a) would become effective 1 July 1981 and apply "to claims filed with the Industrial Commission on and after that date." 1981 N.C. Sess. Laws ch. 734, s. 2. Plaintiff's claim was filed on 8 January 1982. Accordingly, the Commission erred in not applying the amended version of N.C. Gen. Stat. 97-58(a).

Defendant argues that the Commission correctly applied the law in effect at the time of Long's disablement, since to do otherwise would be an impermissible retrospective application of the law. A similar contention was rejected in *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979).

In *Booker* an employee contracted serum hepatitis sometime during the first six months of 1971. On 3 January 1974 he died, and on 16 December 1974 his dependents filed claims with the Industrial Commission. The Commission determined that his death was the result of an "occupational disease" as defined by N.C. Gen. Stat. 97-53(13) as it existed at the time of his death, and it awarded his dependents benefits.

This Court reversed on the grounds that the law in effect at the time the employee contracted the disease governed his dependents' claims for benefits and that at that time serum hepatitis was not a compensable injury under the Workers' Compensation Act because it was not expressly listed in the schedule of compensable diseases found in N.C. Gen. Stat. 97-53 and did not fit within the "catchall" definition of an occupational disease set out in N.C. Gen. Stat. 97-53(13). *Booker v. Duke Medical Center*, 32 N.C. App. 185, 231 S.E. 2d 187 (1977). In reversing this Court, the Supreme Court stated:

Since the dependents' right to compensation under G.S. 97-38 does not arise until the employee's death, the date of his death logically governs which statute applies. Contrary to the intimation of the Court of Appeals this construction of G.S. 97-53(13) does not make the statute unconstitutional. A statute is not rendered unconstitutionally retroactive merely because it operates on facts which were in existence prior to its enactment. The proper question for consideration is whether the act as applied will interfere with rights which had vested or liabilities which had accrued at the time it took effect. . . . This is the test which has consistently been ap-

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**Long v. N. C. Finishing Co.**

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plied in construing amendments to our Workmen's Compensation Act. [Citations omitted.]

*Booker*, 297 N.C. at 467, 256 S.E. 2d at 195.

As in *Booker*, the amended version of N.C. Gen. Stat. 97-58(a) was in effect at the time plaintiff's right to compensation arose, viz, the time of Long's death. For the reasons stated in *Booker*, we reject defendant's contention that the amended version of N.C. Gen. Stat. 97-58(a) could not constitutionally apply to plaintiff's claim.

[2] The current version of N.C. Gen. Stat. 97-58(a), which the Commission should apply on remand, provides in pertinent part that "an employer shall not be liable for any compensation for asbestosis unless disablement or death results within ten years after *the last exposure to that disease*. . . ." (Emphasis supplied.) Plaintiff contends that the above requirement is satisfied if the Commission finds that Long was exposed to asbestos dust within ten years of his disablement. However, the Deputy Commissioner interpreted this provision to require a showing that Long "was last *injuriously* exposed to the hazards of asbestos" as defined in N.C. Gen. Stat. 97-57 within ten years of his disablement. (Emphasis supplied.) Similarly, the Commission interpreted an earlier version of N.C. Gen. Stat. 97-58(a), which in pertinent part limits an employer's liability for asbestosis to instances in which "disablement or death results within two years after *the last exposure to such disease*," to require a demonstration that Long "was *injuriously* exposed to the hazards of asbestos dust within the time allowed by statute." (Emphasis supplied.) Since it is apparent from the Deputy Commissioner's findings of fact that on remand the Commission will be required to apply the requirement that plaintiff demonstrate an "exposure to [asbestosis]" within ten years of Long's disablement or death, we address plaintiff's contention.

Defendant argues that N.C. Gen. Stat. 97-58(a) should be interpreted to require proof of an injurious exposure as defined in N.C. Gen. Stat. 97-57 within ten years of death or disablement. We disagree.

N.C. Gen. Stat. 97-57, in pertinent part, provides:

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**Long v. N. C. Finishing Co.**

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In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable.

*For the purpose of this section* when an employee has been exposed to the hazards of asbestosis or silicosis for as much as 30 working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be deemed injurious . . . . [Emphasis supplied.]

Application of the above definition of an "injurious exposure" to the hazards of asbestosis is limited, by the express language of the statute, to determining liability under N.C. Gen. Stat. 97-57.

Further, logically there is no reason to read the exposure requirements of N.C. Gen. Stat. 97-57 into N.C. Gen. Stat. 97-58(a). The purpose of N.C. Gen. Stat. 97-57 is to determine whether there has been sufficient exposure to the hazards of asbestosis during a particular period of employment to hold the employer during that period liable. By contrast, the purpose of N.C. Gen. Stat. 97-58(a) is to limit the time in which an employer is liable for a compensable exposure.

It is well-established that the Workers' Compensation Act "should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependents, and its benefits should not be denied by a technical, narrow, and strict construction." *Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E. 2d 874, 882 (1968). See also *Watkins v. City of Wilmington*, 290 N.C. 276, 282, 225 S.E. 2d 577, 581 (1976); *Petty v. Transport, Inc.*, 276 N.C. 417, 426, 173 S.E. 2d 321, 328 (1970). We thus decline to read the "injurious" exposure requirements of N.C. Gen. Stat. 97-57 into N.C. Gen. Stat. 97-58(a). If the legislature desires that N.C. Gen. Stat. 97-58(a) be so interpreted, it should expressly so provide.

Defendant's cross assignments of error question whether the evidence is sufficient to support certain findings of fact made by the Deputy Commissioner. The Commission did not expressly

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**West v. Hays**

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adopt the Deputy Commissioner's findings. Since it applied N.C. Gen. Stat. 97-58 as it existed at the time of Long's disablement, it may have considered these findings irrelevant. On remand the Commission should consider defendant's contention that certain findings made by the Deputy Commissioner are not supported by the evidence.

For the reasons stated, the Opinion and Award of the Industrial Commission is reversed, and the cause is remanded for a determination of plaintiff's claim not inconsistent with this opinion.

Reversed and remanded.

Judges WEBB and JOHNSON concur.

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J. D. WEST ET UX NINA MAE WEST, BETTY GILLESPIE ET VIR FREEMAN GILLESPIE, WILLIAM E. WEST, JR. ET UX FRANCES WEST, MARGARET GREGORY ET VIR GENE GREGORY, LOUISE CAMPBELL ET VIR JAMES CAMPBELL, EVELYN WEST (WIDOW OF WILLIAM E. WEST, SR.), VANNAH WEST (WIDOW OF LEE WEST), JAMES L. WEST ET UX EULA WEST, NANNIE HAWK ET VIR JOE HAWK v. W. ARTHUR HAYS, JR., EXECUTOR OF THE ESTATE OF ELINOR C. COOK, PATRICIA HAYS ELLIOTT, AUDREY G. HAYS, ANN HAYS WRIGHT AND W. ARTHUR HAYS, JR., INDIVIDUALLY

No. 8530SC1263

(Filed 19 August 1986)

**Deeds § 6.1 — 1947 deed without certification — void**

N.C.G.S. § 39-13.1 and N.C.G.S. § 52-8 did not operate to cure a 1947 deed which was void because the certifying officer taking the acknowledgment of the wife failed to state in his certificate his conclusions as to whether the conveyance was unreasonable or injurious to the wife. N.C.G.S. § 39-13.1(b) purports to cure deeds executed prior to 7 February 1945 and is clearly not applicable; N.C.G.S. § 39-13.1(a) purports to cure deeds which are void for failure to conduct a private examination of the wife, but a private examination was not required in this case; and N.C.G.S. § 52-8 did not cure the void deed because defendants' rights in the subject property vested in 1978 upon the death of the wife and N.C.G.S. § 52-8 was not amended until 1981.

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**West v. Hays**

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APPEAL by defendants from *Downs, Judge*. Judgment entered 1 July 1985 in Superior Court, MACON County. Heard in the Court of Appeals 12 May 1986.

*McKeever, Edwards, Davis & Hays by Ronald M. Cowan and W. Arthur Hays, Jr., for defendant appellants.*

*Coward, Cabler, Sossomon & Hicks by J. K. Coward, Jr., for plaintiff appellees.*

COZORT, Judge.

Plaintiffs instituted this action to be declared the owners, in fee simple absolute, of a certain tract of land in Macon County now in defendants' possession. The trial court entered judgment for the plaintiffs, and defendants appealed. We reverse, holding that G.S. 39-13.1 and G.S. 52-8 cannot cure the void deed in question.

The lands in question in this action were conveyed to Henry D. West and his wife, Elinor C. West, as tenants by the entirety by a recorded deed, dated 21 May 1943, from Lester Henderson and wife, Adeline Henderson. Henry D. West and Elinor C. West, as tenants by the entirety, executed a deed conveying the lands from Henry D. West and wife, Elinor C. West, to Walter Dean, dated 2 September 1947, acknowledged and recorded 3 September 1947. The execution of this deed was acknowledged by Henry D. West and wife, Elinor C. West, to the Honorable Clinton Brookshire, Clerk of Superior Court, Macon County, on 3 September 1947, but the clerk's certificate contained no statement of his conclusions and findings of fact as to whether the deed was "unreasonable or injurious" to Elinor C. West as was required by then G.S. 52-12 (Cum. Supp. 1949) (later G.S. 52-6, repealed by Session Laws 1977, c. 375, s. 1, effective 1 January 1978) and G.S. 47-39 (Cum. Supp. 1949) (repealed by Session Laws 1977, c. 375, s. 16, effective 1 January 1978). Walter Dean and wife, Timmie Dean, executed a deed dated 3 September 1947, conveying the lands back to Henry and Elinor West. This deed was recorded fifteen minutes after the deed from the Wests to the Deans was recorded. The deed from the Deans to the Wests gave Elinor C. West a life estate and Henry D. West, and his heirs and assigns, a vested remainder in fee simple after the death of Elinor C. West.

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West v. Hays

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Henry D. West died intestate on 26 January 1948, survived by his wife, Elinor C. West, and four children from a previous marriage. Plaintiffs are the heirs of Henry D. West from this previous marriage. Elinor C. West later remarried and was thereafter known as Elinor C. Cook. Elinor C. Cook died testate on 19 October 1978, and the devisees of Mrs. Cook acquired the lands in question through the residuary clause of Mrs. Cook's will. Those devisees are the defendants here.

The superior court concluded that the deed in question from Henry D. West and wife, Elinor C. West, to Walter Dean, dated 2 September 1947, was void and of no legal effect because the then applicable provisions of G.S. 52-12 and G.S. 47-39 were not complied with in that the clerk of court failed to find that the transaction was not "unreasonable or injurious" to Elinor C. West. The parties have not excepted to that conclusion. The superior court further concluded, however, that G.S. 39-13.1 (1984) and G.S. 52-8 (1984) operate to cure this defect in the deed in question, that the deed and acknowledgment thereof was in all other respects regular, and that plaintiffs are the owners in fee simple of the land. It is these conclusions which form the basis of defendants' appeal.

Defendants argue, and we agree, that G.S. 39-13.1 (1984) is inapplicable to this case and that G.S. 52-8 (1984) cannot operate to cure the void deed in question.

The parties are in agreement, and the superior court found and concluded, that the transaction between the Wests and the Deans was a "straw man" transaction. Thus, the deed in question is one between Elinor C. West and her husband, Henry D. West. At the time the deed from the Wests to the Deans was executed, 2 September 1947, and acknowledged 3 September 1947, G.S. 52-12 and G.S. 47-39 required the acknowledging officer on the deed to find and so certify that the deed is not "unreasonable or injurious to [the wife]." G.S. 52-12 (Cum. Supp. 1949) (later G.S. 52-6, repealed by Session Laws 1977, c. 375, s. 1, effective 1 January 1978); G.S. 47-39 (Cum. Supp. 1949) (repealed by Session Laws 1977, c. 375, s. 16, effective 1 January 1978). No private examination of the wife was required by then G.S. 52-12 and G.S. 47-39. If the certifying officer taking the acknowledgment of the wife failed, however, to state in his certificate his conclusions as to



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West v. Hays

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whether the conveyance is "unreasonable or injurious to her," the deed is void and of no legal effect. *Davis v. Vaughn*, 243 N.C. 486, 91 S.E. 2d 165 (1956); *McCullen v. Durham*, 229 N.C. 418, 50 S.E. 2d 511 (1948). The trial court, as the parties do not contest, was correct in its determination that the deed in question was void.

We do not agree, however, with the trial court's conclusion that G.S. 39-13.1 operated to cure the void deed. We find G.S. 39-13.1 inapplicable to the facts of this case. G.S. 39-13.1(b), which purports to cure deeds executed prior to 7 February 1945, clearly is not applicable here. G.S. 39-13.1(a) provides that, "[n]o deed, contract, conveyance, leasehold or other instrument executed since the seventh day of November, 1944, shall be declared invalid because of the failure to take the *private examination* of any married woman who was a party to such deed, contract, conveyance, leasehold or other instrument." [Emphasis added.] The plain language of G.S. 39-13.1(a) purports to cure deeds which are void because of failure to conduct a private examination of the wife. As noted previously, on 3 September 1947, G.S. 52-12 and G.S. 47-39 did not require a private examination of the wife. Rather, G.S. 52-12 and G.S. 47-39 required that the certifying officer conclude that the transaction was not "unreasonable or injurious" to the wife. G.S. 39-13.1(a) does not purport to cure, and does not in fact cure, deeds which are void because the certifying officer taking the acknowledgment of the wife failed to state in his certificate his findings of fact and conclusions that the conveyance is not "unreasonable or injurious to her." We hold the superior court erred in concluding that G.S. 39-13.1 operates to cure the void deed in question.

The superior court further concluded that G.S. 52-8 operates to cure the void deed in question. We hold that G.S. 52-8 cannot operate to cure the void deed.

G.S. 52-8 was amended in 1981 in an attempt to cure deeds which lack the certification that the transaction was not unreasonable or injurious to the wife. G.S. 52-8 (1984) reads as follows:

Any contract between husband and wife coming within the provisions of G.S. 52-6 [formerly G.S. 52-12] executed between January 1, 1930, and January 1, 1978, which does not comply with the requirement of a private examination of the wife or with the requirements that there be findings that

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West v. Hays

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*such a contract between a husband and wife is not unreasonable or injurious to the wife* and which is in all other respects regular is hereby validated and confirmed to the same extent as if the examination of the wife had been separate and apart from the husband. This section shall not affect pending litigation. (Emphasis added.)

It appears on its face that G.S. 52-8 by its terms purports to cure the 3 September 1947 deed in question. As we have previously held, however, the deed in question is void. Defendants' rights in the subject property vested in 1978 upon the death of Elinor C. Cook. G.S. 52-8, which purports to cure the deed in question, was not amended until 1981. In *Mansour v. Rabil*, 277 N.C. 364, 376, 177 S.E. 2d 849, 857 (1970), our Supreme Court held that "[a] void contract cannot be validated by a subsequent act, and the Legislature has no power to pass acts affecting vested rights. *Booth v. Hairston*, 193 N.C. 278, 136 S.E. 879; *Foster v. Williams*, 182 N.C. 632, 109 S.E. 2d 834; 7 Strong's N.C. Index 2d, Statutes Sec. 8; 7 Strong's N.C. Index 2d, Curative Statutes Sec. 9." To apply G.S. 52-8 to cure the void deed in the present case would violate this rule of law. Thus, we find the superior court erred in concluding that G.S. 52-8 operates to cure the void deed in question.

We find plaintiffs' cross-appeal, that defendants are estopped from denying plaintiffs' title due to the doctrine of laches, to be without merit. See *Mansour v. Rabil*, *supra*.

In summary, we hold that G.S. 39-13.1 and G.S. 52-8 cannot operate to cure the void deed from the Wests to the Deans. As such, the Wests held the property as tenants by the entirety, with Mrs. West (later Mrs. Cook) as the sole owner upon Mr. West's death. Defendants, as the devisees of Mrs. Cook, acquired the property upon Mrs. Cook's death. Plaintiffs, the heirs of Mr. West, have no interest in the land; and the trial court erred in entering judgment for the plaintiffs.

Reversed and remanded for entry of judgment for the defendants.

Chief Judge HEDRICK and Judge EAGLES concur.

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**Collector Cars of Nags Head, Inc. v. G.C.S. Electronics**

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**COLLECTOR CARS OF NAGS HEAD, INC. v. G.C.S. ELECTRONICS**

No. 851DC1285

(Filed 19 August 1986)

**1. Process § 14.4— foreign corporation—jurisdiction—promise to deliver goods to a carrier for shipment to North Carolina**

A promise to deliver goods to a carrier for shipment to North Carolina was sufficient to confer statutory jurisdiction under N.C.G.S. § 1-75.4(5)(e).

**2. Process § 14.3— foreign corporation—jurisdiction—contract made in North Carolina**

N.C.G.S. § 55-145(a)(1) (1982) provided jurisdiction over a foreign corporation where a North Carolina corporation called from North Carolina and offered to purchase the product, and the written contract was executed in North Carolina.

**3. Process § 14.2— foreign corporation—minimum contacts**

The demands of due process were satisfied since a suit was based on a contract with substantial connection with North Carolina where G.C.S., the foreign corporation, purposely entered into a contract with Collector Cars promising to ship its product to North Carolina through a carrier; Collector Cars' president called G.C.S. from North Carolina to make the offer; and G.C.S. mailed the contract to North Carolina, accepted payment mailed from North Carolina, and mailed a confirmation of the contract to North Carolina.

APPEAL by defendant from *Parker, Judge*. Judgment entered 3 October 1985 in District Court, DARE County. Heard in the Court of Appeals 16 April 1986.

*Leonard G. Logan, Jr., P.A., by Leonard G. Logan, for plaintiff appellee.*

*Shearin & Archbell, by Roy A. Archbell, Jr., for defendant appellant.*

BECTION, Judge.

Defendant, G.C.S. Electronics, Inc., a California corporation, appeals from the trial court's ruling that the North Carolina courts have *in personam* jurisdiction over the defendant in an action brought by Collector Cars of Nags Head, Inc., a North Carolina corporation. We affirm.

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Collector Cars of Nags Head, Inc. v. G.C.S. Electronics

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## I

G.C.S. Electronics, Inc. (G.C.S.), a California corporation whose principal place of business is in Costa Mesa, California, advertised a portable telephone in a national publication with circulation in North Carolina. The president of Collector Cars of Nags Head, Inc. (Collector Cars) telephoned G.C.S. in California in response to this advertisement and offered to purchase an "Auto Phone" for \$4,595.00. G.C.S. mailed a written contract from California to Collector Cars in North Carolina which confirmed the order and price. The contract provided that the laws of California would govern the agreement, that the costs of shipment were to be borne by Collector Cars, and that all risk of loss would pass to Collector Cars when G.C.S. delivered the product to a carrier for shipment to North Carolina. Collector Cars executed the contract in North Carolina and mailed the contract and a check for the full purchase price to G.C.S. in California. G.C.S. negotiated the check in California and mailed a confirmation of the contract to North Carolina.

Collector Cars later attempted to cancel the contract, alleging G.C.S. breached the agreement in failing to meet the delivery date. G.C.S. has not delivered the product, and Collector Cars seeks to recover the purchase price.

G.C.S. has no agents or employees who have ever been in North Carolina in connection with its business activities, nor were other sales made by G.C.S. to anyone located in North Carolina prior to this contract. G.C.S. does not advertise in magazines or newspapers whose circulation is primarily limited to North Carolina.

## II

[1] The determination whether there is *in personam* jurisdiction over a foreign corporation is two-part: (1) Does a statutory basis for personal jurisdiction exist, and (2) if so, does the exercise of this jurisdiction violate constitutional due process? *J. M. Thompson Co. v. Doral Manufacturing Co., Inc.*, 72 N.C. App. 419, 324 S.E. 2d 909, *disc. rev. denied*, 313 N.C. 603, 330 S.E. 2d 611 (1985). N.C. Gen. Stat. Sec. 1-75.41(5)(c) and (e) (1983) provide a statutory basis for personal jurisdiction when an action:

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Collector Cars of Nags Head, Inc. v. G.C.S. Electronics

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(c) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State or to ship from this State goods, documents of title, or other things of value.

\* \* \* \*

(e) Relates to goods, documents of title, or other things of value actually received by the plaintiff in this State from the defendant through a carrier without regard to where delivery to the carrier occurred.

G.C.S. contends G.S. Sec. 1-75.4(5)(c) is inapplicable to these facts since G.C.S. never promised to deliver the product to North Carolina, but instead promised delivery to a carrier for shipment to Collector Cars. G.C.S. also argues G.S. Sec. 1-75.4(5)(e) is inapplicable because the goods were never "actually received" in North Carolina.

We agree with Collector Cars' contention that the promise to deliver goods to a carrier for shipment to North Carolina is sufficient to confer statutory jurisdiction. This Court has interpreted G.S. 1-75.4(5)(e) to give jurisdiction over a foreign corporation when title to the goods passed upon delivery to a carrier in another state, but the plaintiff did not take actual possession until the goods arrived in North Carolina. *W. Conway Owens and Associates, Inc. v. Karman, Inc.*, 75 N.C. App. 559, 331 S.E. 2d 279 (1985). G.S. 1-75.4(5)(c) confers jurisdiction when a foreign corporation promises to deliver goods to this State. G.C.S.'s promise to deliver the product through a carrier does not deprive North Carolina courts of jurisdiction when the parties to the contract contemplated shipment to North Carolina.

[2] Furthermore, N.C. Gen. Stat. Sec. 55-145(a)(1) (1982) provides jurisdiction over a foreign corporation whether or not it is transacting or has transacted business in this State if the cause of action arises out of any contract made in this State. Since Collector Cars called from North Carolina to offer to purchase the product, and the written contract was executed in North Carolina, the statutory jurisdiction requirements are satisfied.

[3] For the exercise of jurisdiction to comport with federal due process, the defendant not present in the forum state must have

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Collector Cars of Nags Head, Inc. v. G.C.S. Electronics

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"certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L.Ed. 2d 95, 102, 66 S.Ct. 154, 158 (1945). The defendant's conduct and connection with the forum state must be such that he should "reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L.Ed. 2d 490, 501, 100 S.Ct. 559, 567 (1980). A single contract may be sufficient to satisfy the minimal contacts requirement. *Bynum v. Register's Truck & Equipment Co., Inc.*, 32 N.C. App. 135, 231 S.E. 2d 39 (1977).

We found minimum contacts in *Conway Owens* under the following circumstances: the North Carolina plaintiff purchased goods from the defendant in Colorado, as it had on one other occasion; the contract expressly stated it was made pursuant to Colorado law; the goods were shipped to North Carolina and then immediately sent to Germany without being opened; and the Colorado corporation had no other contact with North Carolina. We found in *Conway Owens*, as we do in the present case, that the demands of due process were satisfied since the suit was based on a contract with substantial connection to North Carolina.

G.C.S. purposely entered into a contract with Collector Cars promising to ship its product to North Carolina through a carrier. Collector Cars' president called G.C.S. from North Carolina to make the offer. G.C.S. mailed the contract to North Carolina, accepted payment mailed from North Carolina, and mailed a confirmation of the contract to North Carolina. These acts manifest a willingness by G.C.S. to conduct business in North Carolina. *In personam* jurisdiction is present when there is "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L.Ed. 2d 1283, 1298, 78 S.Ct. 1228 (1958). The exercise of personal jurisdiction over G.C.S. neither upsets traditional notions of fairness nor extends beyond what G.C.S. could have reasonably anticipated.

### III

For the reasons set forth above, we find no error in the trial court's determination that the contacts between G.C.S. Elec-

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**Durham Highway Fire Protection Assoc. v. Baker**

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tronics, Inc. and the forum state were sufficient to give North Carolina courts *in personam* jurisdiction over the defendant.

Affirmed.

Judges PHILLIPS and COZORT concur.

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DURHAM HIGHWAY FIRE PROTECTION ASSOCIATION, INC., AND FURINA RESCUE, INC. v. JOHN H. BAKER, JR., SHERIFF OF WAKE COUNTY AND J. RANDOLPH RILEY, DISTRICT ATTORNEY FOR THE TENTH PROSECUTORIAL DISTRICT

No. 8610SC86

(Filed 19 August 1986)

**Gambling § 1—bingo—prohibition on two sessions within 48 hours—constitutional**

The prohibition of N.C.G.S. § 14-309.8 against two sessions of bingo within a 48-hour period was constitutional because the meaning of "sessions" within the context of the statute as a whole is quite plain to anyone of common understanding, and the First Amendment right to free speech was not violated because the statute does not impinge upon plaintiffs' right to solicit contributions from whomever they desire.

APPEAL by plaintiffs from *Barnette, Judge*. Order entered 19 August 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 16 May 1986.

*Boyce, Mitchell, Burns & Smith, by Susan K. Burkhart, for plaintiff appellants.*

*No brief filed by defendant appellee John H. Baker, Jr.*

*Attorney General Thornburg, by Assistant Attorney General Newton G. Pritchett, Jr., for defendant appellee J. Randolph Riley.*

PHILLIPS, Judge.

When this action was filed each of the plaintiffs, as an "exempt organization" under G.S. 14-309.6(1), was licensed to conduct bingo games and each had been conducting its games immediately after the games of another exempt organization in the same build-

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**Durham Highway Fire Protection Assoc. v. Baker**

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ing. On 13 August 1984 the defendant Sheriff advised each of the plaintiffs that conducting two sessions of bingo during a 48-hour period violated G.S. 14-309.8 and that future violations would result in prosecution. Plaintiffs sued to declare the cited statute unconstitutional and obtained orders temporarily and preliminarily restraining the defendants from arresting or prosecuting them because of the violations alleged. Later, pursuant to defendants' motion, an order of summary judgment was entered dissolving the injunction and dismissing plaintiffs' action. The only question presented by plaintiffs' appeal is the constitutionality of the emphasized portion of G.S. 14-309.8, which reads as follows:

The number of sessions of bingo conducted or sponsored by an exempt organization shall be limited to two sessions per week and such sessions must not exceed a period of five hours each per session. *No two sessions of bingo shall be held within a 48-hour period of time.* No more than two sessions of bingo shall be operated or conducted in any one building, hall or structure during any one calendar week and if two sessions are held, they must be held by the same exempt organization. This section shall not apply to bingo games conducted at a fair or other exhibition conducted pursuant to Article 45 of Chapter 106 of the General Statutes. (Emphasis supplied.)

Plaintiffs contend on appeal, as they alleged in the complaint, that the 48-hour proviso violates the due process, free speech, and equal protection of the law guarantees contained in both the United States and North Carolina Constitutions. These contentions have no merit and require little discussion.

The theory of plaintiffs' due process claim is that the statute is too vague to be generally followed or enforced because the words "session" and "sessions" are not defined by the statute and can mean different things to different people. But in the context of the statute as a whole, which is what we are concerned with, the meaning of these words is quite plain to anyone of common understanding and the statute is not unconstitutionally vague. *State v. Lowry and State v. Mallory*, 263 N.C. 536, 139 S.E. 2d 870 (1965). A "session" of bingo as used in the statute means a period of time in which bingo is conducted or sponsored by a particular exempt organization in one location, and "sessions" is more than



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**Durham Highway Fire Protection Assoc. v. Baker**

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one session. Thus, it is quite clear that plaintiffs were violating the statute by conducting a bingo session immediately after a similar session by another organization at the same location. The First Amendment free speech theory is that since plaintiffs raise money for charity through bingo limiting them to one session of bingo during a 48-hour period unduly restricts their right to solicit charitable contributions. While soliciting contributions is certainly protected by the First Amendment, *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 63 L.Ed. 2d 73, 100 S.Ct. 826, reh. denied, 445 U.S. 972, 64 L.Ed. 2d 250, 100 S.Ct. 1668 (1980), this statute does not impinge upon plaintiffs' right to solicit contributions, charitable or otherwise, from whomever they desire. The statute restricts only the conducting of bingo, which is gambling, and no one has a constitutional right to operate a gambling business. *Marvin v. Trout*, 199 U.S. 212, 50 L.Ed. 157, 26 S.Ct. 31 (1905). The equal protection argument is that the 48-hour provision creates a favored and unfavored class because the first organization to conduct its bingo session in a given location during that period is not subject to prosecution but the second organization is, and that no rational basis exists for creating these two classes. Statutes are always creating classes and making distinctions, and it is lawful to do so as long as the distinction is reasonably related to the accomplishment of a purpose that the Legislature has the power to reach. *Durham Council of the Blind v. Edmisten*, 79 N.C. App. 156, 339 S.E. 2d 84 (1986). Obviously, one purpose of the distinction in question, a laudable and proper one, is to limit gambling, an offense against public morals when not conducted as the statute specifies. G.S. 14-292; G.S. 14-309.12. Except for this or some similar limitation licensed bingo, instead of providing brief and occasional opportunities for harmless recreation, could fill the weekends of many people to their ruinous cost in money and otherwise.

Affirmed.

Judges MARTIN and PARKER concur.

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**State v. Holloway**

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**STATE OF NORTH CAROLINA v. DONALD GENE HOLLOWAY**

No. 8615SC157

(Filed 19 August 1986)

**Criminal Law § 89.1— indecent liberties with a child—testimony of pediatrician and psychologist that victim truthful—erroneous**

The trial court committed plain error in a prosecution for taking indecent liberties with a child where the child testified to the facts alleged in the indictment; the defendant testified to the contrary and presented evidence tending to show a normal relationship with the child; no one but the child and defendant was present when the alleged offense occurred; the child was not physically injured and did not report the alleged incident to her father and stepmother until more than four weeks later; and two witnesses for the State, a pediatrician and a child psychologist, testified that in their opinion the child had testified truthfully. N.C.G.S. § 8C-1, Rule 702.

**APPEAL** by defendant from *Farmer, Judge*. Judgment entered 16 September 1985 in Superior Court, CHATHAM County. Heard in the Court of Appeals 10 June 1986.

*Attorney General Thornburg, by Assistant Attorney General John R. Corne, for the State.*

*Appellate Defender Hunter, by Assistant Appellate Defender Leland Q. Towns, for defendant appellant.*

**PHILLIPS, Judge.**

Defendant was convicted of taking indecent liberties with his five-year-old stepdaughter in violation of G.S. 14-202.1 and requests a new trial because of inadmissible and prejudicial testimony that was received into evidence against him. The evidence was not objected to, however, and our consideration of the request is controlled by the "plain error" doctrine adopted by our Supreme Court in *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983) and *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). Under that doctrine a "plain error," which justifies relief on appeal though not objected to in the trial court, is more than an obvious error that adversely affects a defendant. A "plain error" is—

a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,"

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State v. Holloway

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or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." (Emphasis theirs.)

*United States v. McCaskill*, 676 F. 2d 995, 1003 (4th Cir.), cert. denied, 459 U.S. 1018, 74 L.Ed. 2d 513, 103 S.Ct. 381 (1982), quoted with approval in both *State v. Black*, *supra*, and *State v. Odom*, *supra*.

The evidence erroneously used to convict defendant clearly meets that test in our opinion and we order a new trial. Our decision does not require an extended statement of facts or even a recital of the melancholy and sordid details of the charge involved. It is sufficient to say that: The child testified to the facts alleged in the indictment; the defendant testified to the contrary and presented evidence tending to show a normal relationship between him and the child; no one but the child and defendant was present when the alleged offense occurred; the child was not physically injured and did not report the alleged incident to her father and stepmother until more than four weeks later; and two witnesses for the State, a pediatrician and a child psychologist, testified that in their opinion the child had testified *truthfully*. The evidence did not meet the requirements for expert testimony as it concerned the credibility of a witness, a field in which jurors are supreme and require no assistance, rather than some fact involving "scientific, technical or other specialized knowledge." G.S. 8C-1, Rule 702, N.C. Evidence Code. And as character evidence the testimony violated the provisions of G.S. 8C-1, Rules 405(a) and 608 of the N.C. Evidence Code, as well as the holding in *State v. Heath*, 316 N.C. 337, 341 S.E. 2d 565 (1986). That this grossly improper testimony unfairly affected defendant's trial seems obvious to us. For a jury trial to be fair it is fundamental that the credibility of witnesses must be determined by them, unaided by anyone, including the judge. Yet, though the State's case depended almost entirely upon the child's credibility as a witness, her credibility in the eyes of the jury was inevitably increased, we

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City of Charlotte v. Rouso

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believe, by these two learned and prestigious professionals declaring that her testimony was true.

New trial.

Judges WHICHARD and MARTIN concur.

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CITY OF CHARLOTTE, A MUNICIPAL CORPORATION v. ALBERT S. ROUSSO AND WIFE, DORIS H. ROUSSO; AND BROWNLEE JEWELERS, INC., LESSEE

No. 8626SC160

(Filed 19 August 1986)

**Eminent Domain § 3— taking of lot for park—valid**

An order permitting the City of Charlotte to condemn defendants' lot for a public park was valid where an earlier judgment for defendants was not *res judicata* because that judgment was based on a resolution that some of the land be leased to private retail businesses and that portion of the resolution had been rescinded; the City was not required to adopt a specific design for the park; and there was no abuse of discretion by the City in refusing to accept defendants' settlement offer. N.C.G.S. § 40A-3(b)(3).

APPEAL by defendants from *Snepp, Judge*. Order entered 13 September 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 June 1986.

*Deputy City Attorney H. Michael Boyd for plaintiff appellee.*

*Levine and Levine, by Sol Levine and Miles S. Levine, for defendant appellants.*

PHILLIPS, Judge.

The order appealed from permits plaintiff City to condemn defendants' lot situated on South Tryon Street in downtown Charlotte for a public park. In disputing the validity of the order the defendants make three contentions, all of which are manifestly without merit, and we overrule them.

Their first contention is that this suit is barred under *res judicata* by a judgment which dismissed a prior suit by plaintiff to condemn the same land; but this case is not based upon the same

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City of Charlotte v. Rouso

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facts as the prior case and *res judicata* does not apply. *Flynt v. Flynt*, 237 N.C. 754, 75 S.E. 2d 901 (1953). The first proceeding was based upon a plan to lease some of the condemned land "to private parties for use in retail business," which, of course, is not a public purpose, as Judge Snapp correctly held in dismissing the action. The basis for this case is different. After the prior action was dismissed the City's governing body rescinded the resolution that it was based upon and adopted a new condemnation resolution that is free of the illegal taint that caused the earlier case to fail. A judgment, even though in an action between the same parties, operates as an estoppel only as to the facts in existence when the judgment was rendered; it does not bar a re-litigation of the same issue when new facts occur that alter the legal rights of the parties in regard to the issue. *Flynt v. Flynt, supra*. Thus, the judgment in the former action bars the plaintiff City only from condemning defendants' land for commercial or business purposes, which the law does not authorize; it does not bar it from condemning the land for the sole purpose of using it as a public park, which the law does authorize.

Defendants' second contention is that the court's finding and holding that the condemnation is for a public purpose is erroneous because the plaintiff has not yet adopted a specific design for the proposed park. No authority for this argument is cited and we can imagine none, since it would be folly to require a city to design a public facility authorized by resolution before the land for the facility is acquired. In any event, neither G.S. 40A-3(b)(3), which vests municipalities with the power of eminent domain to establish, enlarge, or improve parks, playgrounds and other recreational facilities, nor G.S. 160A-353, of similar import, nor any other statute, so far as we can determine, contains any such requirement. Clearly, the defendants' land is being taken for a public purpose, as the court found, and no other finding was necessary. *Redevelopment Commission of Greensboro v. Hagins*, 258 N.C. 220, 128 S.E. 2d 391 (1962).

Defendants' final contention is that the City acted "arbitrarily and capriciously" in refusing to accept a settlement offer they made which, among other things, involved leaving their land out of the proposed park and permitting them to remodel and maintain the building on it as a National Historical building. A condemner of land has very broad discretion, *Jeffress v. Greenville*,

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**City of Charlotte v. Russo**

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154 N.C. 490, 70 S.E. 919 (1911), and the record contains no suggestion that the plaintiff abused it by adopting and following its own plan rather than that of the defendants.

Affirmed.

Judges WHICHARD and MARTIN concur.

## CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 AUGUST 1986

|  |  |   |
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| DANIELS v. N. C. DIVISION<br>OF MOTOR VEHICLES<br>No. 8614SC249    | Durham<br>(85CVS0890)                                    | Reversed  |
| DOUGLAS v. CENTURY HOME<br>BUILDERS, INC.<br>No. 8526SC1223        | Mecklenburg<br>(83CVS8024)                               | No Error  |
| E & J INVESTMENTS, INC. v.<br>CITY OF FAYETTEVILLE<br>No. 8612SC71 | Cumberland<br>(82CVS2209)                                | Affirmed  |
| IN RE PERRY<br>No. 869DC290  | Granville<br>(85SP321)                                   | Affirmed  |
| KINSER v. FOY<br>No. 8528SC1260                                    | Buncombe<br>(84CVS1309)                                  | Affirmed in part<br>and remanded.   |
| PARKER v. LIPPARD<br>No. 8615SC308                                 | Alamance<br>(84SP12)                                     | Reversed  |
| STATE v. ANGE<br>No. 862SC215                                      | Washington<br>(C3952297)<br>(85CRS1159)                  | Affirmed  |
| STATE v. BELL AND LUCAS<br>No. 8615SC196                           | Alamance<br>(84CRS12831)<br>(84CRS12832)<br>(84CRS12834) | Judgment Arrested   |
| STATE v. BROWN<br>No. 8623SC247                                    | Yadkin<br>(85CRS2761)                                    | No Error  |
| STATE v. CHAMBERS<br>No. 8626SC147                                 | Mecklenburg<br>(85CRS28783)                              | No Error  |
| STATE v. COPELAND<br>No. 866SC204                                  | Northampton<br>(85CRS2716)                               | Felony breaking<br>or entering con-<br>viction, Case No.<br>85CRS2716 — No<br>error. Felony<br>larceny and felony<br>possession of<br>stolen goods con-<br>victions, Case No.<br>85CRS2716-A —<br>Judgment of felony<br>possession of stolen<br>goods vacated,<br>judgment of felony<br>larceny remanded<br>for resentencing. |

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| STATE v. CROSS<br>No. 8623SC236                              | Yadkin<br>(85CRS187)                                     | No Error          |
| STATE v. DANIEL<br>No. 8617SC213                             | Rockingham<br>(85CRS7764)                                | Reversed          |
| STATE v. GILLILAND<br>No. 8627SC265                          | Gaston<br>(85CRS6659)<br>(85CRS6660)                     | No Error          |
| STATE v. GODWIN<br>No. 8616SC203                             | Robeson<br>(85CRS16786)                                  | No Error          |
| STATE v. HENSLEY<br>No. 8617SC234                            | Rockingham<br>(84CRS1224)                                | No Error          |
| STATE v. HOPE<br>No. 8416SC1196                              | Scotland<br>(84CRS518)                                   | No Error          |
| STATE v. ISOM<br>No. 8619SC183                               | Cabarrus<br>(82CRS9220)<br>(82CRS9221)                   | Affirmed          |
| STATE v. LANEY<br>No. 855SC1354                              | New Hanover<br>(84CRS9946)<br>(84CRS9947)<br>(84CRS9948) | No Error          |
| STATE v. LAWSON<br>No. 8614SC257                             | Durham<br>(85CRS3311)<br>(85CRS6936)                     | No Error          |
| STATE v. LIGHTSEY<br>No. 8626SC281                           | Mecklenburg<br>(85CRS35084)                              | Judgment Arrested |
| STATE v. McDOWELL<br>No. 8627SC175                           | Gaston<br>(85CRS5068)<br>(85CRS5069)<br>(85CRS5070)      | No Error          |
| STATE v. MANNING<br>No. 8617SC217                            | Surry<br>(85CRS1992)<br>(85CRS1993)<br>(85CRS1994)       | No Error          |
| STATE v. MARTIN<br>No. 854SC1247                             | Onslow<br>(85CRS2504)                                    | No Error          |
| STATE v. MULGROW<br>No. 861SC235                             | Perquimans<br>(84CRS962)                                 | No Error          |
| STATE v. ROGERSON<br>AND<br>STATE v. SHANNON<br>No. 861SC133 | Pasquotank<br>(85CRS1689)<br>Pasquotank<br>(85CRS1690)   | No Error          |



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| STATE v. SPRINGS<br>No. 8619SC264                         | Rowan<br>(85CRS9166)    | No Error |
| STATE v. TATE<br>No. 8527SC1351                           | Gaston<br>(85CRS8970)   | No Error |
| TANDY COMPUTER LEASING,<br>INC. v. EDSALL<br>No. 8628DC83 | Buncombe<br>(84CVD1138) | Affirmed |
| WILLIAMS v. BROSNAN<br>No. 8528SC1342                     | Buncombe<br>(85CVS2089) | Affirmed |
| WINFREE v. HARVELL<br>No. 8618SC319                       | Guilford<br>(85SP254)   | Affirmed |

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**State v. Moorman**

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**STATE OF NORTH CAROLINA v. PERCY ROBERT MOORMAN**

No. 8610SC1

(Filed 2 September 1986)

**1. Rape and Allied Offenses § 3— second degree rape—indictment alleged force—evidence showed physically helpless—fatal variance**

The trial court erred by denying defendant's motion to dismiss a charge of second degree rape where the indictment alleged that defendant carnally knew the prosecutrix by force and against her will and the State's evidence tended to show that the prosecutrix fell asleep on her bed in her room, dreamed that she was having sexual intercourse, awoke to find a male on top of her engaging in sexual intercourse, tried to sit up, and was grabbed by the neck and pushed back down. Rape is complete upon penetration and the penetration and initiation of sexual intercourse here was achieved while the prosecutrix was asleep and unable to communicate an unwillingness to submit to the act. N.C.G.S. § 14-27.3, N.C.G.S. § 14-27.1(3).

**2. Rape and Allied Offenses § 5— second degree sexual offense—evidence sufficient**

The evidence of second degree sexual offense was sufficient to withstand a motion to dismiss where defendant admitted anal intercourse with the prosecutrix; the State's evidence indicated that upon awakening and prior to the anal intercourse, the prosecutrix attempted to sit up but defendant grabbed her by the neck and pushed her back down onto the bed with enough force to cause multiple scratches and bruising about the neck; the prosecutrix was then scared that defendant might injure her further and thus offered no other resistance; and, as a result of the anal intercourse, the prosecutrix received a one-half inch tear or fissure in the anus. N.C.G.S. § 14-27.5(a)(1).

**3. Criminal Law § 99.2— comments by trial judge—not prejudicial**

Comments by the trial judge both in and out of the jury's presence were entirely unnecessary and improper but not prejudicial. N.C.G.S. § 15A-1222.

**4. Criminal Law § 88.5— denial of recross-examination—no abuse of discretion**

The trial court did not abuse its discretion in a prosecution for burglary and rape by denying defendant the opportunity to recross-examine certain witnesses where the court permitted thorough cross-examination of each of the witnesses and where the material cited as the basis for recross-examination was either not new or was irrelevant to determining guilt or innocence. Sixth and Fourteenth Amendments to the U. S. Constitution.

**5. Jury § 7.14— peremptory challenges—removal of blacks—no error**

Defendant did not meet the standard of *Swain v. Alabama*, 380 U.S. 202, in arguing that the trial court erred by refusing to impanel a new jury after the State used peremptory challenges to remove all blacks from the jury where defendant challenged the exclusion of blacks solely in this case and not in relation to any allegation of a long-term systematic practice by the State of excluding blacks from service on petit juries in Wake County.

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**State v. Moorman**

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**6. Constitutional Law § 48— ineffective assistance of counsel—not prejudicial**

The trial court did not err in a prosecution for burglary and rape by denying defendant's motion for appropriate relief based on ineffective assistance of counsel where the court found that counsel's preparation and presentation of defendant's case was inadequate; found that counsel's cross-examination of prosecution witnesses was thorough and aggressive; found that there was no likely possibility that the factfinders would have had a reasonable doubt as to the defendant's guilt even in the absence of errors by counsel; and concluded that defendant had failed to show that his attorney's conduct adversely affected the jury verdict to the extent that the defendant's trial could not be relied on as having produced a just result. The court's findings of fact were supported by the evidence and the facts supported the conclusions of law. Sixth Amendment to the U. S. Constitution, Art. I, §§ 19 and 23 of the North Carolina Constitution.

APPEAL by defendant from *Bailey, Judge*, and *Stephens, Judge*. Judgments entered 29 May 1985 and order entered 9 August 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 13 June 1986.

Defendant was charged with first degree burglary, second degree rape, and second degree sexual offense. The jury returned verdicts finding defendant guilty of misdemeanor breaking or entering, second degree rape, and second degree sexual offense.

After the return of the verdicts but before the sentencing hearing, defendant filed a motion to relieve his trial counsel, Jerome "Jerry" Paul. The court granted the motion. Defendant was thereafter represented by present counsel.

The trial court entered judgments sentencing defendant to two years imprisonment for breaking or entering, twelve years imprisonment for second degree rape, and twelve years for second degree sexual offense, all to be served as a committed youthful offender. The sentences were to be served concurrently. Following sentencing, defendant filed a motion for appropriate relief requesting a new trial on the ground that his trial counsel was ineffective and that he was convicted in violation of the United States and North Carolina Constitutions. The motion was heard and denied.

From the judgments and order, defendant appeals.

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State v. Moorman

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*Attorney General Lacy H. Thornburg, by Assistant Attorneys General David Roy Blackwell, Steven F. Bryant, and John H. Watters, for the State.*

*Tharrington, Smith & Hargrove, by Roger W. Smith, George T. Rogister, Jr., J. David Farren, Burton Craige, and G. Bryan Collins, Jr., for defendant appellant.*

ARNOLD, Judge.

Defendant first contends that the trial court erred in denying his motion for dismissal of the charges of second degree rape and second degree sexual offense based upon insufficiency of the evidence. We hold the trial court properly denied dismissal of the charge of second degree sexual offense. As to the charge of second degree rape, we find there is a fatal variance between the indictment and the proof, and therefore the judgment as to this charge must be arrested.

[1] The indictment for second degree rape in the present case reads:

Date of Offense: September 1, 1984  
Offense in Violation of G.S. 14-27.3

The jurors for the State upon their oath present that on or about the date of offense shown and in [Wake] [C]ounty . . . the defendant . . . unlawfully, willfully and feloniously did ravish and carnally know [the prosecutrix], by force and against her will, in violation of N.C.G.S. 14-72.3 (sic).

We note that G.S. 14-72.3 concerns the removal of shopping carts from shopping premises. It is recognized that a reference in an indictment to the specific section of the General Statutes relied upon is not necessary to its validity, and reference to an inapposite statute will not vitiate such an indictment. *State v. McKinnon*, 35 N.C. App. 741, 242 S.E. 2d 545 (1978). Furthermore, the indictment does include reference to the appropriate statute, G.S. 14-27.3.

General Statute 14-27.3 reads in pertinent part:

(a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:

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State v. Moorman

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- (1) By force and against the will of the other person; or
- (2) Who is . . . physically helpless, and the person performing the act knows or should reasonably know the other person is . . . physically helpless.

"Physically helpless" is defined in G.S. 14-27.1(3) as meaning "(i) a victim who is unconscious; or (ii) a victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act."

The State presented evidence which tended to show the following facts. On the evening of 31 August 1984, the prosecutrix dated a friend from Charlotte and met with friends. During the evening she consumed two beers. She returned to her room at approximately 1:00 a.m. on the morning of 1 September 1984. She entered her room, closed the door, and turned on the radio to a low volume. She then fell asleep on her bed fully clothed. The next thing she remembered was that she dreamed she was having sexual intercourse. She awoke in a darkened room to find a male on top of her engaging in sexual intercourse. She tried to sit up, but the male grabbed her by the neck and pushed her back down causing multiple scratches about the neck. Afraid that the male might injure her, she offered no further resistance. After ejaculating in her vagina, the male engaged in anal intercourse with the prosecutrix, causing a one-half inch tear or fissure in her anus. She did not resist due to the pain and fear that the male might strangle her. After the male stopped, she went to the door and turned on the light. She recognized the face of the male, but could not remember his name. The male told her not to call the police, that he was her roommate's friend Percy, that he thought she was the roommate, and that he would not have done what he did if he had known she was not the roommate.

The facts of this case present a question of first impression. The evidence indicates the initiation of sexual intercourse occurred while the prosecutrix was asleep, but that upon awakening, defendant used force in pushing the prosecutrix back down upon the bed. General Statute 14-27.3 provides for two distinct and separate offenses of second degree rape in that force is not an element of the rape of a physically helpless person. It is well settled that an indictment will not support a conviction for a

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*State v. Moorman*

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crime, all the elements of which are not accurately and clearly alleged in the indictment. *State v. Perry*, 291 N.C. 586, 231 S.E. 2d 262 (1977). The indictment in this case used the language "by force and against her will," giving notice of violation of G.S. 14-27.3(a)(1). The indictment failed to allege that defendant engaged in sexual intercourse with a person who is "physically helpless," which would give notice of a violation of G.S. 14-27.3(a)(2). A person who is asleep is "physically helpless" within the meaning of the statute. Thus, we are faced with the question of whether, given the facts of the case, the State issued a proper indictment for second degree rape.

Our State Supreme Court, in discussing the minimum elements necessary to constitute rape, has stated that ". . . the offense shall be completed upon proof of penetration only." *State v. Monds*, 130 N.C. 697, 41 S.E. 789 (1902). A recent case has also indicated that the force required to constitute rape must be actual or constructive force used to achieve or accomplish the sexual intercourse. See *State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984). Furthermore the language from § 65 Am. Jur. 2d, Rape, §§ 4-6, regarding the element of force, indicates that the force must be used to achieve the sexual intercourse.

In view of the above cited authority and the language of G.S. 14-27.3(a), we hold that the proper indictment for the rape of a person who is asleep is one alleging rape of a "physically helpless" person. In the present case, penetration and the initiation of sexual intercourse was achieved while the prosecutrix was asleep and unable to communicate an unwillingness to submit to the act. Thus, there is a fatal variance between the indictment's allegations that defendant carnally knew the prosecutrix by force and against her will and the proof the State presented at trial. The trial court should have granted the motion to dismiss the second degree rape charge, and the judgment as to that offense must be arrested.

[2] Defendant also asserts that the evidence presented is insufficient to support his conviction of second degree sexual offense. To withstand a motion to dismiss for insufficiency of the evidence, there must be substantial evidence of all material elements of the offense charged. *State v. Keyes*; *State v. Cashion*, 64 N.C. App. 529, 307 S.E. 2d 820 (1983). In ruling on a motion for dismissal, the

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*State v. Moorman*

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trial judge must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. *Id.*

In accord with the indictment, the elements of second degree sexual offense are (1) a sexual act, (2) against the will and without the consent of the victim, (3) using force sufficient to overcome any resistance of the victim. G.S. 14-27.5(a)(1); *State v. Jones*, 304 N.C. 323, 283 S.E. 2d 483 (1981). "Sexual act," as defined by G.S. 14-27.1(4), includes anal intercourse.

Defendant in his testimony admits engaging in anal intercourse with the prosecutrix. The only remaining question is whether there is sufficient evidence that such intercourse was by force and against the will of the prosecutrix. The State's evidence indicates that upon awakening and prior to the anal intercourse, the prosecutrix attempted to sit up but defendant grabbed the prosecutrix by the neck and pushed her back down onto the bed with enough force to cause multiple scratches and bruising about the neck. After this use of force, the prosecutrix was scared that defendant might injure her further, and thus offered no other resistance. As a result of the anal intercourse, the prosecutrix received a one-half inch tear or fissure in the anus. We find this evidence constitutes substantial evidence of all material elements of second degree sexual offense and is thus sufficient to withstand a motion to dismiss.

[3] Defendant's next four assignments of error concern comments made by the court during the trial. G.S. 15A-1222 places a duty on the trial judge to be absolutely impartial. The judge is not to intimate an opinion in any way, but is to insure a fair and impartial trial before a jury.

The challenged remarks in this case were made both in and out of the jury's presence. There is no need to set out all of the excepted statements. The following comment is illustrative:

DISTRICT ATTORNEY: Object to Mr. Paul making his little noises over there, Judge, whatever that is.

COURT: Well, for lack of a description, I believe I'll overrule your objection. I thought maybe we had a hog loose in the room. All right, we will stop at this time for lunch. . . .

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State v. Moorman

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We do not approve of the judge's comments. Nevertheless, while these gratuitous statements before the jury were entirely unnecessary and improper, we do not find that their probable result was prejudicial to defendant. *See State v. Lofton*, 66 N.C. App. 79, 310 S.E. 2d 633 (1984).

[4] Defendant next contends that the trial court erred in denying the opportunity to conduct recross-examination of certain witnesses, and thus violated his right to confront adversarial witnesses guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. We do not agree. The scope of cross-examination rests largely within the discretion of the trial court, and its rulings thereon will not be disturbed absent a clear showing of abuse or prejudice. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622, 103 S.Ct. 474 (1982). Furthermore, after a witness has been cross-examined and reexamined, unless the redirect examination includes new matter, it is in the discretion of the judge to permit or refuse a second cross-examination, and counsel cannot demand it as of right. 1 Brandis on N.C. Evidence § 36 (2d rev. ed. 1982); *State v. Bunton*, 27 N.C. App. 704, 220 S.E. 2d 354 (1975). The trial court permitted thorough cross-examination of each of the witnesses. The material cited in defendant's brief as the basis for his contention that the trial court erred in restricting or denying recross-examination is either not new matter, or it is irrelevant to determining the guilt or innocence of the defendant. The trial court did not abuse its discretion in restricting a second opportunity to cross-examine, and, in view of the thorough cross-examination of the State's witnesses, defendant's contention that he was denied his right to confront adversarial witnesses is without merit.

Defendant also contends that the trial court erred in failing to issue proper instructions in the charge to the jury. Specifically, defendant brings forth five assignments of error asserting that the court improperly omitted certain instructions and one assignment of error alleging that the court erred in part of the instructions given to the jury. Defendant admits that no objection was made at trial concerning the jury instructions. Therefore, defendant relies upon the plain error rule as adopted in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), in bringing forward these exceptions and assignments of error. Many of the exceptions we need not address since we have arrested judgment as to the



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State v. Moorman

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charge of second degree rape. The other exceptions noted by defendant do not rise to the level of plain error, and the assignments of error are without merit.

[5] Defendant also alleges that the trial court erred when it refused to impanel a new jury after the State used peremptory challenges to remove all blacks from the jury. Of the four peremptory challenges exercised by the prosecutor, one was used to remove a black person from the main jury and two were used to remove blacks as alternate jurors. Defendant challenges the exclusion of blacks solely in this case and not in relation to any allegation of a long-term systematic practice by the State of excluding blacks from service on petit juries in Wake County. Defendant's argument is without merit.

The present case is governed by the law as set forth in *Swain v. Alabama*, 380 U.S. 202, 13 L.Ed. 2d 759, 85 S.Ct. 824, *reh'g denied*, 381 U.S. 921, 14 L.Ed. 2d 442, 85 S.Ct. 1528 (1965), and as consistently adopted and applied by our State Supreme Court. *State v. Jackson*, 317 N.C. 1, 343 S.E. 2d 814 (1986). Our Supreme Court has recently ruled that *Batson v. Kentucky*, --- U.S. ---, 90 L.Ed. 2d 69, 106 S.Ct. 1712 (1986), which overruled the evidentiary standard established in *Swain*, is to be given prospective application only to cases where the jury selection occurred after the *Batson* decision was rendered. *Id.*

In *Swain*, the United States Supreme Court held that, in light of the purposes and functions of peremptory challenges, the Constitution did not mandate an examination of the prosecutor's reasons for exercising the challenges in any particular case. Instead, the presumption in any given case was that the prosecution utilized its peremptory challenges to obtain a fair and impartial jury. The Supreme Court went on to say that in order for a defendant to prevail on a claim that the prosecutor had unconstitutionally excluded blacks from his jury, he was required to establish that the prosecutor had engaged in case after case in a pattern of systematic use of peremptory challenges to exclude blacks from the petit jury.

*Id.* at ---, 343 S.E. 2d at 820. Defendant has not met the *Swain* standard.

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State v. Moorman

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[6] Finally, defendant contends that he was prejudiced by ineffective assistance of counsel in violation of his rights as guaranteed by the Sixth Amendment to the United States Constitution and Article 1, §§ 19 and 23 of the North Carolina Constitution. We do not agree.

A defendant's right to counsel includes the right to the effective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 324 S.E. 2d 241 (1985). The test for ineffective assistance of counsel is the same under both Constitutions. *Id.* When a defendant attacks his counsel on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness. *Id.*, citing *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 2d 674, 104 S.Ct. 2052 (1984). In order to meet this burden defendant must satisfy a two-part test.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. *This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.* (Emphasis added.)

*Strickland*, 466 U.S. at 687, 80 L.Ed. 2d at 693, quoted in *Braswell*, 312 N.C. at 562, 324 S.E. 2d at 248.

Upon the hearing of defendant's motion for appropriate relief, the court made extensive findings of fact. Based upon those findings of fact the court concluded that as a matter of law

the pretrial and trial performance of Jerome Paul was significantly deficient and fell well below the minimum standard of professional competence expected and required of attorneys handling serious criminal cases in the Superior Courts of Wake County. The quality of Mr. Paul's representation was far below that standard of practice routinely engaged in by members of the Wake County Bar who practice criminal law in the Superior Court.

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State v. Moorman

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Wherefore, the defendant has met his first burden as required by *State v. Braswell, supra*, to establish marked deficiencies [sic] in the performance of his trial defense attorney.

The court then proceeded to make the following FINDINGS OF FACT and CONCLUSIONS OF LAW as to any actual prejudice suffered by defendant.

FINDINGS OF FACT [ACTUAL PREJUDICE]

In order to prevail, the defendant must also establish that the deficiencies of his attorney were so substantial that they undermined the adversarial process to the extent that the jury verdict was unreliable. In essence, the defendant must show that he was prejudiced by these deficiencies and that absent such deficiencies [sic] there is a reasonable probability that the result of the trial would have been different.

(1) This Court has carefully examined the testimony at this hearing and the testimony contained in the trial transcript. The defendant has failed to show how any witness's testimony would be different at a new trial or how any witness's testimony would have been different had the witness been interviewed and prepared by Attorney Paul or any attorney prior to the trial. The only additional witness not called by Attorney Paul at trial who is presently available to testify at a new trial is Ms. Underwood. She is employed by an agency of the court which makes investigations regarding pretrial release. She spoke to the victim after Mr. Moorman's arrest and was advised by [the prosecutrix] that she has no objection to Moorman's release on bond. [The prosecutrix] advised Underwood that she was not afraid of Moorman but that she did fear harassment from his friends.

Although this witness was not called by Attorney Paul, he did cross examine [the prosecutrix] regarding these statements and she admitted making them. Therefore, any testimony of Ms. Underwood would have been cumulative at best. Also, this testimony is not exculpatory of the defendant and fails to have any direct bearing upon the question of his guilt.

Wherefore, the Court finds as a fact that even though Attorney Paul was deficient in his investigation and his trial

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**State v. Moorman**

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performance, all witnesses with relevant evidence testified to the full extent of their knowledge at the defendant's trial. There is no new evidence or undeveloped evidence which was not presented. The defendant has even failed to explain how his own testimony would have been different.

The Court also finds that Attorney Paul's cross-examination of the victim, of the investigating police officers and of all crucial prosecution witnesses was thorough and aggressive. Although deficient in preparing and presenting his own case, Attorney Paul was not deficient in attacking the prosecution's case. The defendant has failed to show any area of cross-examination or impeachment which was neglected by Attorney Paul. The Court finds that the defendant has failed to show any prejudice resulting from Attorney Paul's performance attacking the prosecution's case. The defendant has failed to show any additional evidence that should have been developed in that regard which was not developed and explored.

(2) The Court finds that the jury verdicts were based upon a determination by the jury that [the prosecutrix] testified truthfully and that Percy Moorman did not. After carefully examining the testimony of these two people it is not difficult to determine how the jury reached that conclusion. Although [the prosecutrix's] testimony of these events could be characterized as unusual, the testimony of the defendant was simply not credible. [The prosecutrix's] testimony was corroborated by evidence of physical injuries to her neck and rectum consistent with an assault. Based upon the evidence reflected in the trial transcript, this Court cannot say that absent all deficiencies by Attorney Paul there is a reasonable possibility or probability that the jury verdict would have been different. Even in the absence of the errors by counsel discussed above, there is no likely possibility that the factfinders would have had a reasonable doubt as to the defendant's guilt.

The Court finds that jurors honor and carefully follow the instructions that require that they ultimately base their decisions on the true facts and upon the law. Sometimes they do this with the aid of counsel; sometimes they do this in

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**State v. Moorman**

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spite of counsel. The Court is satisfied that the jury in this case returned a verdict based upon the law and the evidence without regard to and unaffected by the conduct of Attorney Paul.

CONCLUSIONS OF LAW [ACTUAL PREJUDICE]

Based upon the foregoing findings of fact, the Court concludes as a matter of law that the defendant has failed to show that he was in any manner prejudiced by the deficiencies of his attorney at trial or that there is a reasonable probability or possibility that in the absence of these deficiencies the jury would have had a reasonable doubt of his guilt. The defendant has failed to show that his attorney's conduct adversely affected the jury verdict to the extent that the defendant's trial cannot be relied on as having produced a just result.

The court therefore denied defendant's motion for appropriate relief based on ineffective assistance of counsel.

In reviewing an order entered on a motion for appropriate relief, the findings of fact made by the trial court are binding upon an appellate court if they are supported by evidence, even though the evidence is conflicting. *State v. Stevens*, 305 N.C. 712, 291 S.E. 2d 585 (1982). Our inquiry as an appellate court is to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the hearing court. *Id.*

We have reviewed the evidence and find that the court's findings of fact are supported by evidence in the record, and that the facts support the conclusions of law. We agree with the court's conclusions based upon the facts as found and, moreover, conclude that any errors by counsel were not so serious as to deprive defendant of a fair trial. The order denying defendant's motion for appropriate relief is supported by the findings of fact and conclusions of law and should be upheld.

The result in the case is as follows:

84CRS61128—judgment arrested.

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**In re Baby Boy Shamp**

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84CRS61127 and 84CRS66019—no error.

Judges WELLS and PARKER concur.

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IN RE: BABY BOY SHAMP, A MINOR CHILD

No. 8626SC115

(Filed 2 September 1986)

**1. Adoption § 2; Rules of Civil Procedure § 24— intervention by natural parents—service of motion—sufficient for jurisdiction**

In an adoption proceeding in which the natural parents intervened, the trial court acquired personal jurisdiction without the issuance and service of summons where the natural parents served their motion to intervene upon the attorneys for the guardian ad litem and the Department of Social Services; a party who intervenes pursuant to N.C.G.S. § 1A-1, Rule 24 is not required to issue a summons and complaint pursuant to N.C.G.S. 1A-1, Rule 4. Although the motion to intervene was not served upon the parties petitioning to adopt the child, those petitioners did not appeal.

**2. Appeal and Error § 6.8— denial of motions for Rule 12(b)(6) dismissal and for summary judgment—interlocutory**

In a contested adoption proceeding, the denial of motions for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) and for summary judgment presented no question for appellate review.

**3. Fraud § 12; Adoption § 2.1— consent obtained by fraud—evidence sufficient**

In a contested adoption proceeding, the trial court did not err by denying the motions of the guardian ad litem and DSS for directed verdict and judgment n.o.v. on the issue of fraud where the child's mother and paternal grandmother testified that a social worker had made representations regarding the grandparents' chances of adopting the child, even though the father had testified that he did not remember the social worker making representations to him; there was evidence that the statements were not merely expressions of opinion in that the social worker said the grandparents had a fifty/fifty chance of adopting the child but shouldn't have any trouble since Social Services always tried to keep the child in the family, even though she knew of the Department's adoption procedures and knew that her opinion that the grandparents were not suitable would be considered by the Department; there was evidence that the social worker made the statements to induce the parents to execute consent forms; and there was sufficient evidence for the jury to find that a prudent person could have reasonably relied on the social worker's statements in signing the consent forms without reading them in that the social worker did not tell the parents that anyone other than the grandparents could be considered for the adoption and told the parents that the forms were

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**In re Baby Boy Shamp**

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a mere formality that had to be signed in order for the grandparents to file for adoption. N.C.G.S. 48-9.

**4. Adoption § 2.1— contested adoption—instructions—no error**

The trial court did not err in its jury instructions in a contested adoption proceeding where the instructions requested by the guardian ad litem were given in substance.

APPEAL by Mecklenburg County Department of Social Services and Guardian Ad Litem for the minor child from *Downs, Judge*. Judgment entered 6 September 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 August 1986.

This is a proceeding for the adoption of Baby Boy Shamp, a minor child, instituted before the Clerk of Superior Court of Mecklenburg County. On 11 February 1985, the parents of the child, Clifford Shamp and Tammy Shamp, filed motions to intervene in the adoption proceedings and to set aside consent to the adoption, alleging that their signatures on documents entitled "Parent's Release, Surrender and General Consent to Adoption" had been procured by fraud and that Clifford Shamp had been under the influence of drugs when he signed the consent. On 27 February 1985, the Mecklenburg County Department of Social Services filed a motion to dismiss the parents' motions pursuant to G.S. 1A-1, Rules 12(b)(1), (2), (3) and (6), wherein it denied the allegations contained in the motions. On 26 February 1985, the guardian ad litem for the minor child filed a motion joining in the motion of the Department of Social Services. On 14 March 1985, the grandparents of the minor child filed a motion to intervene in the adoption proceeding. On 19 March 1985, the clerk of superior court entered an order allowing the motions to intervene, denying the motions to dismiss, and transferring the case to superior court for trial.

Uncontroverted evidence introduced at trial tends to show the following: Baby Boy Shamp was born on 16 August 1983 to Tammy and Clifford Shamp. On 22 February 1984, Tammy Shamp contacted the Mecklenburg County Department of Social Services (hereinafter the Department) because of family problems which were interfering with their ability to care for their child. On 29 February 1984, a juvenile petition was filed alleging that the child was neglected and dependent as defined by G.S. 7A-517 and an

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*In re Baby Boy Shamp*

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order was issued, temporarily placing the child in the custody of the Department. Following a hearing on 2 March 1984, Judge Matus entered an order in which he found that the parents consented to the juvenile remaining in the custody of the Department, ordered that the Department retain custody and scheduled an adjudicatory hearing for 27 March 1984. Following the hearing on 27 March 1984, Judge Matus entered an order concluding that the child was a dependent child and ordering that the child be placed temporarily in the custody of the paternal grandparents and that the parties formulate a plan concerning the permanent placement of the child. The parents and Laverne King, a social worker for the Department, signed an agreement on 21 May 1984 giving the parents nine months to accomplish six goals in order to regain custody of their son.

On 15 June 1984, the parents met with Laverne King at the Department and executed consents for adoption, which contained the following provision: "I hereby give general consent to the adoption of said child by any person or persons that may be designated by said director of (social services) without further consent on my part and without notice to me." The document further provided that the consent could be revoked within thirty days. Neither parent revoked their consent within this time period.

The circumstances surrounding the execution of the consent forms are in dispute. The intervenor parents introduced evidence tending to show the following: About a month before the execution of the consent forms, the parents realized that they were not going to be able to meet the requirements of their agreement with the Department to regain custody of their child. They decided to allow the grandparents to adopt the child if they would not be able to get him back. The parents met with Laverne King on 13 June 1984, at the home of the child's grandparents to discuss the adoption. Ms. King told the parents that the grandparents had a "fifty/fifty chance of being able to adopt Bobby, but, off the record, since they were family, there shouldn't be any problem, because Social Services always tries to keep the baby in the family." Ms. King did not tell the Shamps that there was a possibility that the child could be placed with a family that they did not know. Ms. King did not discuss alternatives to adoption with the Shamps. Ms. King asked each of the parents if they wanted the grandparents to adopt the child, and they responded



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**In re Baby Boy Shamp**

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affirmatively. Ms. King told the parents that they would have to sign consents for adoption before the grandparents could file for adoption and arranged for them to meet with her at the Department on 15 June 1984. When the parents met with Ms. King on 15 June, she handed them consents for adoption, briefly went over them, and explained that "it was a formality that had to be signed in order for Barbara and Clifford Shamp [the grandparents] to file for adoption." (Transcript p. 70.) They each signed the forms without reading them. After they signed the forms, Ms. King asked them if they would like for the grandparents to adopt the child and they each responded affirmatively. Clifford Shamp testified that he had probably been smoking marijuana the day he signed the consent. Ms. King never told the parents at the meetings on 13 June and 15 June that in her opinion the grandparents should not be allowed to adopt the child or that she would make a recommendation regarding the adoption of the child. Ms. King did not meet with the grandparents after the 13 June meeting. The Shamps first learned in January that the grandparents would not be allowed to adopt the child.

The Department presented evidence tending to show that it never made any representations to the Shamps relating to the chances the grandparents had of adopting the child. On 7 June 1984, Ms. King learned that the child's father was in jail and arranged to meet with the family on 13 June 1984 to discuss the family situation. She testified that the father spoke first at the meeting and said that he thought it would be best to surrender the child for adoption and his wife agreed. She told them to think about their decision and arranged to meet with them on 15 June. At the meeting on 15 June, she read each paragraph of the consent and explained it to the Shamps. She asked each of them their wishes with regard to the placement of the child and they said they would like for the paternal grandparents to adopt. Ms. King testified that she told the Shamps that the Department had the ultimate decision as to where to place the child and it was possible that the grandparents would not be chosen as adoptive parents. She further testified that she had reservations "all along" about the grandparents' suitability as adopting parents and had an opinion on the day that the consents were signed that they should not be allowed to adopt. She did not disclose her opinion to the parents. She testified that she did not form the decision

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**In re Baby Boy Shamp**

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to recommend against adoption by the grandparents until 20 July 1984, when she dictated the transfer summary to the next social worker to work on the case. She further testified that she knew from the time she was first assigned to the case that she would be on the adoption committee in the event the Shamp child was surrendered for adoption, because the social worker who worked with the family is always on the adoption committee. She did not disclose this information to the Shamps because it was against Department policy to disclose the names of the members of the adoption committee.

At the close of the parents' evidence the trial court allowed the motion of the Department and the guardian ad litem for directed verdict against the father with respect to his claim that he was incompetent to execute the consent form. The trial court denied the motions of the Department and the guardian ad litem made at the close of the parents' evidence and at the close of all the evidence for directed verdict on the "fraud" issue. The following issues were submitted to the jury and were answered as indicated:

(1) Was [Clifford] Robert Shamp fraudulently induced by the Mecklenburg County Department of Social Services to execute a "Parent's Release, Surrender and General Consent to Adoption"?

ANSWER: Yes.

(2) Was Tammy Shamp fraudulently induced by the Mecklenburg County Department of Social Services to execute a "Parent's Release, Surrender and General Consent to Adoption"?

ANSWER: Yes.

On 6 September 1985, the trial court entered judgment on the verdict, ordering that the consent forms executed by the Shamps are rescinded and are null and void. The Department and the guardian ad litem made motions for judgment notwithstanding the verdict or in the alternative for a new trial, which were denied on 23 September 1985. The respondents, the Department and guardian ad litem, gave notice of appeal from the judgment entered on 6 September 1985 and the order entered on 23 September 1985.

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**In re Baby Boy Shamp**

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*William F. Burns, Jr., for intervenors, appellees.*

*Ruff, Bond, Cobb, Wade & McNair, by Moses Luski and William H. McNair, for respondent, appellant Mecklenburg County Department of Social Services.*

*Gillespie & Lesesne, by Donald S. Gillespie, Jr., for respondent, appellate guardian ad litem for the minor child.*

HEDRICK, Chief Judge.

[1] By Assignments of Error Nos. 3 and 4, the respondents, appellants, the Department and the guardian ad litem, contend that the trial court erred "by failing to dismiss the case which was patently devoid of proper service of process so that personal jurisdiction was lacking." Respondents argue the trial court lacked personal jurisdiction because the parents did not have summons issued and served upon the parties in accordance with G.S. 1A-1, Rule 4. Respondents' contentions are without merit.

This adoption proceeding was instituted when prospective adopting parents filed a petition for adoption in the office of the clerk of superior court pursuant to G.S. 48-15. The natural parents of the child intervened in these proceedings by making a motion to intervene pursuant to G.S. 1A-1, Rule 24. This motion was served upon the attorneys for the guardian ad litem and the Department by depositing a copy of the motion in the United States mail, in accordance with the provisions of G.S. 1A-1, Rule 5. A party who intervenes pursuant to Rule 24 is not required to issue a summons and complaint pursuant to G.S. 1A-1, Rule 4. *Kahan v. Longiotti*, 45 N.C. App. 367, 263 S.E. 2d 345, *disc. rev. denied*, 300 N.C. 374, 267 S.E. 2d 675 (1980). Service pursuant to G.S. 1A-1, Rule 5 of the motion accompanied with the pleading is sufficient service upon the party against whom relief is sought or denied in the intervenor's pleading and is sufficient process to acquire jurisdiction over the party if all other requisites for jurisdiction are met. *Id.* Therefore, in the present case, the intervenor's service of the motion to intervene on the appellants was proper. Respondents argue that the motion was not served in accordance with G.S. 1A-1, Rule 5 upon the parties petitioning to adopt the child. Since these petitioners did not appeal to this Court, this issue is not properly presented by this appeal.

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*In re Baby Boy Shamp*

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[2] Respondents next assign error to the trial court's denial of their 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted and their motions for summary judgment. These assignments of error present no question for review. *Harris v. Walden*, 314 N.C. 284, 333 S.E. 2d 254 (1985); *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 340 S.E. 2d 755 (1986).

[3] Respondents contend that the trial court erred in denying their motions for directed verdict and judgment notwithstanding the verdict on the issue of fraud. Respondents also assign error to the trial court's instructions on fraud. Respondents argue that the evidence was insufficient to establish the elements of fraud and therefore, that the consent forms executed by the Shamps were irrevocable.

Pursuant to G.S. 48-9, the parents of a child may, in writing, surrender the child to a director of a county department of social services and consent to the general adoption of the child. G.S. 48-11 provides, in pertinent part, that such consent shall not be revocable after thirty days from the date of the giving of consent. After the statutory period terminates, the right of the natural parent to revoke terminates, absent a showing of fraud in obtaining the consent. *In re Kasim*, 58 N.C. App. 36, 293 S.E. 2d 247, *disc. rev. denied*, 306 N.C. 742, 295 S.E. 2d 478 (1982). The elements of fraud are as follows:

(1) That defendant made a representation relating to some material past or existing fact; (2) that the representation was false; (3) that when he made it, defendant knew that the representation was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that defendant made the representation with intention that it should be acted upon by plaintiff; (5) that plaintiff reasonably relied upon the representation and acted upon it; and (6) that plaintiff thereby suffered injury.

*Keith v. Wilder*, 241 N.C. 672, 675, 86 S.E. 2d 444, 446 (1955) (citations omitted).

Respondent Department contends that Clifford Shamp testified that "he could not remember Laverne King making any representations to him on June 13, 1984, which effectively vitiates

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In re Baby Boy Shamp

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his fraud cause of action." Respondent argues that because Clifford Shamp testified that he could not remember Ms. King's statements at the time of the trial, there is no evidence that any misrepresentation was made to him. This contention is without merit. Tammy Shamp, Clifford Shamp's wife, and his mother testified that Clifford Shamp was present in his parents' home on 13 June 1984 when Ms. King made statements relating to his parents' chances of being able to adopt his child and that he participated in the discussion regarding the adoption. This evidence is clearly sufficient for the jury to find that Ms. King made representations to Clifford Shamp regarding the adoption of his child by his parents.

Respondent Department contends that the record contains no evidence of a misrepresentation of a past or existing fact, but that the statements of Ms. King were merely statements of opinion relating to future prospects. Respondent Department and respondent guardian ad litem further contend that there is no evidence that the statements were false or that Ms. King made them with the intent to deceive the parents of the child. We disagree with respondents' contentions.

To constitute fraud, the misrepresentation must relate to a subsisting or ascertainable fact, as distinguished from a matter of opinion or a representation relating to future prospects. *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974). Generally, the statement must be definite and specific, but the specificity required depends upon the tendency to deceive under the circumstances. *Id.* In *Ragsdale*, our Supreme Court held that statements by the plaintiff that a corporation was a "gold mine" and a "going concern," where plaintiff, as president of the corporation, had peculiar knowledge of the facts and knew that the business had lost money in recent months, presented a jury question as to whether the representations were mere expressions of opinion or statements of material fact. The Court further held that the plaintiff had the duty to make a full disclosure of the financial conditions of the corporation, because once he assumed to speak, he had the duty to make a full disclosure of all matters discussed. *Id.*; see also, *Shaver v. Monroe Construction Co.*, 63 N.C. App. 605, 306 S.E. 2d 519 (1983), *disc. rev. denied*, 310 N.C. 154, 311 S.E. 2d 294 (1984).

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**In re Baby Boy Shamp**

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Mere unfulfilled promises, generally, cannot be the basis for an action in fraud. *Williams v. Williams*, 220 N.C. 806, 18 S.E. 2d 364 (1942). If, however, the promise is made to induce the promisee to act and with no intention of carrying it out, this being a misrepresentation of the promisor's state of mind which is a material fact, it will support an action for fraud. *Id.*

In the present case, the parents introduced evidence tending to show that Ms. King told them that the grandparents had a "fifty/fifty chance of being able to adopt Bobby, but, off the record, since they were family, there shouldn't be any problem, because Social Services always tries to keep the baby in the family." This statement, together with evidence tending to show that Ms. King had knowledge of the Department's adoption procedures and of her impact on the adoption of the Shamp child, presented a jury question as to whether this statement about the grandparents' chances of adopting the child was an expression of an opinion or a statement of material fact. The evidence in the record tending to show that Ms. King had an opinion at the time of the representation that the grandparents were not suitable to adopt the child and knew that this opinion would be considered by the Department in making a decision, is sufficient for the jury to find that the representation was false. Once Ms. King assumed to speak to the Shamps regarding the grandparents' chances of adopting the child, she had the duty to make a full disclosure of facts relating to this matter. *See, Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974). This evidence is also sufficient for the jury to find that Ms. King made the statement to induce the Shamps to execute the consent forms, with the intention of relating to the Department adoption committee her opinion that the grandparents should not be allowed to adopt, thus misrepresenting her state of mind. Furthermore, this evidence also tends to show that Ms. King's representation that the Department "always tries to keep the baby in the family," which was clearly a representation of an existing and material fact, was false. We hold, therefore, that the evidence is sufficient to support findings that Ms. King made a misrepresentation of an existing fact, with knowledge that it was false and with the intent to deceive the Shamps. We have examined the instructions to the jury by the trial court on these issues and hold that they were proper.

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In re Baby Boy Shamp

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Respondent Department further contends that the evidence was insufficient for the jury to find that the parents could have reasonably relied upon the statements of Ms. King, because they both signed written consent agreements which gave the director of social services absolute discretion over the placement of the child, without reading them. Respondent argues that as a matter of law, the parents had no right to rely on the representation of Ms. King. This condition is without merit. One who signs a written instrument is "under a duty to ascertain its contents, and in the absence of a showing that he was willfully misled or misinformed by the defendant as to these contents, or that they were kept from him in fraudulent opposition to his request, he is held to have signed with full knowledge and assent as to what is therein contained." *Williams v. Williams*, 220 N.C. 806, 809-10, 18 S.E. 2d 364, 366 (1942) (citations omitted). Whether a prudent person, under similar circumstances, would have signed an instrument without reading it, is a question of fact for the jury. *Cowart v. Honeycutt*, 257 N.C. 136, 125 S.E. 2d 382 (1962).

In the present case, there is evidence tending to show the following: Tammy Shamp first contacted the Department to get financial assistance and counseling because she and her husband were using drugs and needed help taking care of their baby. Ms. King arranged to meet with the parents and grandparents of the child in the grandparents' home to discuss the family situation. Ms. King had superior knowledge to that of the parents, who were seventeen years old at that time, of the adoption procedures of the Department and knew that she would have input into the decision about placing the child for adoption. At the meeting, Ms. King asked each parent whether they wanted the grandparents to be allowed to adopt the child and they responded affirmatively. While purporting to explain the adoption procedures of the Department to the Shamps, she told them that the grandparents, who had temporary custody of the child, should have no problem in adopting the child because "Social Services always tries to keep the baby in the family." Ms. King did not tell them that anyone other than the parents could be considered for the adoption. There is also evidence tending to show that when the parents arrived at the Department to execute the consents on 15 June 1984, Ms. King briefly went over the forms with them and told them that the forms were "a formality that had to be signed

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Moore v. N.C. Farm Bureau Mut. Ins. Co.

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in order for Barbara and Clifford Shamp [the grandparents] to file for adoption." Under these circumstances, clearly there is sufficient evidence for the jury to find that a prudent person could have reasonably relied on Ms. King's statements concerning the adoption process and the contents of the forms and signed the forms without reading them.

[4] The final contention of the respondent guardian ad litem is that the trial court erred in failing to give specific requested instructions relating to adoption laws in North Carolina and the duty of a person signing a legal document to read it. This contention is without merit. The requested instructions were given in substance, although not in the precise language requested by the guardian ad litem. Therefore, the trial court did not err in failing to give the requested instruction. *King v. Higgins*, 272 N.C. 267, 158 S.E. 2d 67 (1967).

For the foregoing reasons, we hold that the trial court properly denied respondents' motions for directed verdict and judgment notwithstanding the verdict and properly instructed the jury. The judgment appealed from is

Affirmed.

Judges WEBB and WELLS concur.

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JAMES C. MOORE v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 868SC10

(Filed 2 September 1986)

**1. Insurance § 122— condition precedent— production of records— denial of directed verdict for defendant— error**

In an action under a fire insurance policy, the evidence was insufficient to create a jury question as to the reasonableness of the times and places for the production of records by plaintiff where plaintiff received two requests for production of documents at the Lenoir County Courthouse; he refused the first, claiming that the records were in an office in the rear of the store which had burned and that he had not had time to organize them or to clean soot and water damage; the second request specifically provided that plaintiff should



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**Moore v. N.C. Farm Bureau Mut. Ins. Co.**

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produce the records in whatever status they were presently in; plaintiff maintained that he did not have time to compile them; and plaintiff admitted at trial that he need only have transported his files and "a bunch of bags" from the store to the courthouse to comply with defendant's second request for production.

**2. Unfair Competition § 1— refusal to pay fire insurance claim—directed verdict for defendant proper**

The trial court did not err in an action under a fire insurance policy by granting defendant's motion for a directed verdict on plaintiff's claim that defendant violated N.C.G.S. § 75-1.1 where the record revealed no basis for concluding that defendant engaged in unfair or deceptive acts or practices and the court, while considering which issues to submit to the jury, stated that it deemed the claim abandoned because plaintiff had not made reference to the Chapter 75 claim in its brief.

Judge PHILLIPS concurring in the result.

APPEALS by plaintiff and defendant from *Reid, Judge*. Order entered 24 June 1985 in Superior Court, LENOIR County. Heard in the Court of Appeals 10 June 1986.

Plaintiff's grocery store and its contents were substantially damaged by fire. At the time the store was covered under a "Special Multi-Peril" insurance policy issued by defendant. The policy includes standard provisions from N.C. Gen. Stat. 58-176 which provide that

[t]he insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

. . . .

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

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Moore v. N.C. Farm Bureau Mut. Ins. Co.

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Defendant denied plaintiff's claim for damages resulting from the fire. Plaintiff brought this action seeking damages for defendant's alleged breach of the insurance contract. Plaintiff also alleged that defendant committed "a breach of the covenant of good faith and fair dealing" and engaged in "unfair and deceptive acts or practices affecting commerce in violation of [N.C. Gen. Stat. 75-1.1]."

The jury returned a verdict for defendant. The court, *ex mero motu*, set aside the judgment and ordered a new trial as to all issues "for an irregularity from which the [c]ourt determine[d] that the [p]laintiff was prevented from having a fair trial."

Plaintiff and defendant appeal.

*Whitley, Coley, and Wooten, by Robert E. Whitley, for plaintiff.*

*Anderson, Broadfoot, Anderson, Johnson & Anderson, by Henry L. Anderson, Jr., and J. Thomas Cox, Jr., for defendant.*

WHICHARD, Judge.

Defendant's Appeal

[1] Defendant contends the court erred in denying its motion for directed verdict on plaintiff's contractual claims. Specifically, defendant contends that the court should have granted this motion because plaintiff failed to present sufficient evidence demonstrating his compliance with the provisions of the policy requiring the insured to produce books of account and other documents. We agree.

In general,

[i]n considering any motion for directed verdict [under N.C. Gen. Stat. 1A-1, Rule 50], the trial court must view all the evidence that supports the non-movant's claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant's favor.

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**Moore v. N.C. Farm Bureau Mut. Ins. Co.**

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*Bryant v. Nationwide Mutual Fire Insurance*, 313 N.C. 362, 369, 329 S.E. 2d 333, 337-38 (1985). The court may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. *Dickinson v. Pake*, 284 N.C. 576, 583, 201 S.E. 2d 897, 902 (1974).

Plaintiff's evidence tended to show, in pertinent part, that:

Prior to the fire plaintiff maintained an office in the rear portion of the grocery store where he kept most of his business records. After the fire this office had smut damage and water damage but no fire damage. The records were kept in a metal filing cabinet.

By a letter dated 4 November 1983, defendant notified plaintiff that, pursuant to the provisions of the policy, he was "required to submit to an examination under oath at the Lenoir County Courthouse on Wednesday, November 16, at 11:00 A.M." Defendant's letter continued with the following request for production of documents:

At this examination under oath you will be required to produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if the originals be lost, in any way relating to the alleged loss and to [permit] extracts and copies thereof to be made. You should also bring with you any business documents, United States Federal Income Tax Returns and North Carolina State Income Tax Returns for the past three years, any financial statements which pertain to your business, your accounts, deeds to all property owned by [you], your banking records, your inventories concerning your business for the past three years, and sales and receipts for this period of time also.

Plaintiff admitted receiving this letter around 12-13 November 1983. Plaintiff attended the examination on 16 November 1983, but he failed to bring books of accounts, bills, invoices, vouchers, banking records, inventory records, sales and receipts or tax returns. Plaintiff testified at trial that he did not comply with defendant's request because he did not "have time to compile [his records]." Specifically, plaintiff testified that he could not comply because of "the order my records were in, plus the water damage, no electricity, and in the summertime and I couldn't afford to take

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**Moore v. N.C. Farm Bureau Mut. Ins. Co.**

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the stuff in my house until I have everything cleaned out there." At the hearing defendant's counsel asked plaintiff to sign a tax waiver and a release on all his banking records. Plaintiff refused to sign any release forms.

Plaintiff then received notice from defendant, by letter dated 21 November 1983, of a second examination on 2 December 1983. This letter specifically provided that: "[a]s we have conferred by telephone prior to November 16, concerning the examination under oath, we once again request that [plaintiff] bring what records, if any, he has as outlined in [our letter] of November 4, 1983 and in whatever status the records are presently in."

Plaintiff attended the examination on 2 December 1983 and again failed to produce the requested documents. Instead, plaintiff delivered a statement, which provides, in pertinent part:

[T]he compiling and gathering of these documents for your examination is a most difficult task. Almost all of the documents requested were, at the time of the fire, kept in my office located within the store. There has been much smoke and soot damage in my office which has made the removal of my documents and paperwork therefrom a difficult and very time consuming task. I have explained this, through my attorney, to your company on more than one occasion and it is my understanding that representatives of your company have stated to my attorney that they have examined the office in my store and that they did not observe any signs of smoke or soot damage. An examination of my office will clearly show otherwise.

In the last several weeks I have been very busy on a daily basis in farming my farm properties, particularly my soybean crop. I have worked an average of 6 to 7 days a week, approximately 10 to 12 hours per day. Because of this schedule I have not been able to spend any time cleaning and organizing my documents and books to the point they would be removable from my office. Because your company has refused to make any advancements to me, the only source of income I have for my family is the sale of my soybean crop and I simply cannot take any time away from harvesting that crop to attend to the bookkeeping necessary to have these documents in a presentable form.

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**Moore v. N.C. Farm Bureau Mut. Ins. Co.**

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I have brought with me what documents I am able to furnish which did not require substantial time on my part to obtain. I advise each of you present at this hearing that all of my other bookkeeping, accounts and paper work are presently located in the office within my store which is located on Highway 70 East, approximately 2 to 3 miles from the location of this Courthouse. These documents are available for inspection by representatives of your company at the present time. I would be glad to leave the Courthouse and go with representatives of the North Carolina Farm Bureau to my place of business located on Highway 70 East and to permit the examination and/or copying of any documents which I have in my office at the present time.

During the 2 December 1983 examination plaintiff explained this statement:

I don't refuse to go to my office. I'll go to my office right now and be glad to carry you with me. But as far as going and bringing the smutty mess over here, I refuse to do that, but I'll be glad to take you in my automobile and go right now.

Plaintiff admitted at trial that, in order to comply with the second request for production of documents, he only needed to "pull out the [file cabinet] drawer and walk out [of his grocery store or] take a box and put a bunch of bags and files and walk out [of the store] . . . ."

Plaintiff contends the foregoing evidence was sufficient to create a jury question "as to the reasonableness of the times and places for production of records." For reasons hereinafter set forth, we hold that the evidence was insufficient to create a jury question as to the reasonableness of the times and places for production, and that the court thus erred in failing to grant defendant's motion for directed verdict.

In *Chavis v. State Farm Fire and Casualty Co.*, 317 N.C. 683, 346 S.E. 2d 496 (1986), plaintiff-insureds filed suit against defendant-insurer for loss suffered as a result of fire. The trial court granted defendant-insurer's motion for directed verdict on the ground that as a matter of law plaintiffs could not recover on the fire insurance policy issued to them by defendant-insurer because plaintiff-insureds had failed to produce their financial

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**Moore v. N.C. Farm Bureau Mut. Ins. Co.**

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records as required by the policy. The policy included the standard provisions from N.C. Gen. Stat. 58-176 regarding an insured's obligation to produce documents and to comply with policy provisions as a prerequisite to bringing suit. Plaintiff-insureds complied with all requests made by defendant-insurer except for their refusal to sign a form authorizing the release of all of their banking records to defendant-insurer.

The Court held that "plaintiffs were justified as a matter of law in refusing to sign this overbroad release." *Chavis*, 317 N.C. at 688, 346 S.E. 2d at 499. The Court noted that, under the policy terms from N.C. Gen. Stat. 58-176,

the insured as a condition precedent to recovering on the policy must: (1) exhibit the remains of the subject property, (2) submit to examinations under oath, (3) produce for examination, as often as may be reasonably required, all books of account, bills, invoices, and other vouchers, and (4) permit copies of these records to be made.

*Id.* at 686, 346 S.E. 2d at 497. It continued:

In our opinion, the language of the statutory provision in question assumes that the insurer's requests for documents will be reasonable and will relate to the insured property. The provision does not grant to the insurer an unlimited right to roam at will through all of the insureds' financial records without the restriction of reasonableness and specificity. Such an obligation would subject an insured to endless document production . . . .

*Id.* at 687-88, 346 S.E. 2d at 499. The Court thus reasoned:

[W]e construe these particular terms of the policy to require the insurer's request to be specific. The release form in the present case, requesting access to "any and all records" in connection with "all banks and/or any type of lending institution" with which plaintiffs had done "any business" is simply unreasonably broad. It is this lack of specificity in defendant's request and plaintiffs' willingness to comply with all other requests which distinguishes this case from those cases cited by defendant in support of its position . . . . Had defendant's request for banking information been reasonably

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Moore v. N.C. Farm Bureau Mut. Ins. Co.

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specific plaintiffs would have been obligated to produce the requested documents. [Citations omitted.]

*Id.* at 688, 346 S.E. 2d at 499.

In *Chavis* the issue was whether the scope and extent of inquiry pursuant to the request for production of documents was reasonable. Here, by contrast, the issue is whether the time and place for production was reasonable. Accordingly, while both *Chavis* and this case involve the general question of plaintiff-insureds' compliance with requests for production of documents, the precise issue addressed in *Chavis* is distinguishable and does not control the result here.

"Ordinarily, where there is competent evidence, the question of the reasonableness of the demand for the production of [documents] is one of fact for the jury." *Butler Candy Co. v. Springfield Fire & Marine Ins. Co.*, 296 Pa. 552, 559, 146 A. 135, 138 (1929). However, "'when the facts are admitted or clearly proven,' what is reasonable becomes a question of law for the court, depending on the circumstances of each case." *Id.* See also Annot., 63 A.L.R. 504 (1929) and *Couch on Insurance* 2d Sec. 49A-145 (1982).

The evidence here provides the following admitted or clearly proven facts: Plaintiff received two requests for production of documents at the Lenoir County Courthouse. The second request specifically provided that he should produce them in "*whatever status the records are presently in.*" (Emphasis supplied.) Plaintiff expressly refused to bring the requested records to either examination, maintaining that he did not have time to compile them. However, plaintiff admitted at trial that he need only have transported his files in "a bunch of bags" from his store to the courthouse to comply with defendant's second request for production.

We hold that these facts provide no basis from which a jury could find that, under the circumstances, the time or place for the production of these documents was unreasonable. Rather, the evidence shows that plaintiff simply refused to comply with defendant's second request to bring the documents "as is." By failing to "produce for examination [, as often as may be reasonably required,] all books of account, bills, invoices, and other vouchers, . . ." plaintiff has failed to satisfy "a condition precedent to recovering on the policy . . ." *Chavis, supra*, 317 N.C. at

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Moore v. N.C. Farm Bureau Mut. Ins. Co.

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687, 346 S.E. 2d at 498. Accordingly, the court erred in failing to grant defendant's motion for directed verdict on plaintiff's contractual claims. *See Butler, supra*, 296 Pa. at 560, 146 A. at 139.

Given our disposition of this issue, we need not consider defendant's other arguments.

Plaintiff's Appeal

[2] Plaintiff contends the court erred in granting defendant's motion for directed verdict as to plaintiff's claim that defendant violated N.C. Gen. Stat. 75-1.1. Assuming, *arguendo*, that we should even reach this issue in light of our disposition of defendant's appeal, our review of the record reveals no basis for concluding that defendant engaged in unfair or deceptive acts or practices. Further, the court, while considering which issues to submit to the jury, stated that it "takes from the response contained in [plaintiff's] brief, the [p]laintiff not making reference to the Chapter 75 claim, deems it to be abandoned." Accordingly, this assignment of error is overruled.

Given our disposition of defendant's appeal, we need not reach plaintiff's remaining arguments.

For the reasons stated the order granting a new trial is reversed, and the cause is remanded for entry of judgment in favor of defendant.

Reversed and remanded.

Judge PHILLIPS concurs in the result.

Judge MARTIN concurs.

Judge PHILLIPS concurring in the result.

Although I agree that plaintiff's case must fail I do not agree that it should have been dismissed on defendant's motion for a directed verdict. In addition to the portions of plaintiff's letter quoted in the majority opinion, it also stated:

. . . I further state that I have not had the time, opportunity or resources to clean, compile or organize my book-



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**Moore v. N.C. Farm Bureau Mut. Ins. Co.**

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keeping records and that they are essentially in the same condition today that they were in on the date of the fire.

If your company does not desire to examine these documents at my store on today's date, I will make them available for examination by the proper representatives of your company at any other day or time upon reasonable notice to me or my attorney.

I anticipate that I will have the time to go through my records and documents and to put them in such condition that I would be able to present them at the Courthouse by January 15, 1984, or perhaps earlier. If I am able to have these documents in such a state that they would be presentable at the courthouse before January 15, 1984, I will have my attorney contact your representatives. If at any time between now and then representatives of your company would desire to examine these documents for copying or otherwise, I will be glad to make them available upon reasonable notice and at reasonable times.

This evidence, along with plaintiff's other evidence concerning the extensive water and smoke damage done to his office and the papers involved, his unqualified willingness to permit defendant without restriction to examine the records where they then were and to take the records to the courthouse after he had an opportunity to clean and organize them, and as to the demands of his farming business on his time, when viewed in the light most favorable to him clearly raised, I think, a question of reasonableness that jurors, rather than judges, should decide. The evidence not only tends to show plaintiff's good faith willingness to comply with the policy terms, it also tends to indicate that sacking up the papers in their damaged condition and taking them to the courthouse, as the majority holds should have been done, was an unreasonable, wasteful course that would have accomplished nothing whatever.

After this case was fully tried out the jury determined that plaintiff wilfully failed "to produce documents as required under the policy," and in my view judgment for the defendant should have been entered on that verdict. The circumstance that caused the judge to set the verdict aside—that he briefly conversed with the defendant's arson witness in the presence of the jury—could

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**Tyson v. Ciba-Geigy Corp.**

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not have prejudiced the verdict on this crucial issue, or any other issue for that matter, since the jury found that arson was not involved.

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UPTON TYSON v. CIBA-GEIGY CORPORATION AND FARM CHEMICAL CORPORATION

No. 8612SC220

(Filed 2 September 1986)

**1. Rules of Civil Procedure § 15.1— pretrial amendment of complaint—denied—no error**

There was no clear abuse of discretion in the denial of a pretrial motion to amend a complaint to allege negligence where the motion was made over a year and a half after the complaint was filed. N.C.G.S. § 1A-1, Rule 15(a).

**2. Rules of Civil Procedure § 15.2— amendment of complaint to conform to evidence—denied—no abuse of discretion**

The trial court did not err by denying plaintiff's motion to amend his complaint to allege negligence and conform the pleadings to the evidence where the evidence cited by plaintiff also supported the pleaded allegations of breach of warranty. Defendant's failure to object therefore did not amount to implied consent to try negligence. N.C.G.S. § 1A-1, Rule 15(b).

**3. Sales § 17.1— Dual 8E herbicide—breach of express warranty—evidence insufficient**

The evidence was not sufficient to show that defendant breached an express warranty on Dual 8E, a herbicide, where the label attached to the product described its use in soybeans alone or with other herbicides, did not contain directions for mixing with Paraquat and a surfactant, and plaintiff testified that he mixed the Dual 8E with Paraquat and a surfactant and did not follow the directions on the label.

**4. Sales § 17.2— disclaimer of implied warranty of merchantability—darker and larger type—effective**

Defendant effectively disclaimed the implied warranty of merchantability on its herbicide where the disclaimer on its label mentioned merchantability and was in darker and larger type than the other language on the label and was therefore conspicuous. N.C.G.S. § 25-1-201(10), N.C.G.S. § 25-2-316(2).

**5. Sales § 17.1— salesman's statement—no express warranty**

The statement of a salesman that a herbicide would do a good job when mixed with other chemicals was a mere expression of opinion and did not create an express warranty. N.C.G.S. § 25-2-313(1)(a).

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Tyson v. Ciba-Geigy Corp.

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**6. Sales § 17.2— farm chemical supplier—breach of implied warranty—evidence sufficient**

The trial court erred by granting a directed verdict for defendant Farm Chemical where the evidence tended to show that plaintiff contacted Farm Chemical to order the herbicides Lasso and Lorox; plaintiff told an employee that he was planning the no-till cultivation of soybeans on 145 acres of land and described the type of soil on the land; defendant's employee gave Dual 8E a good recommendation, told plaintiff it would do a good job, would be less expensive than the chemicals plaintiff had used in previous years, and would be less risky on plaintiff's type of land; the employee told plaintiff that Dual 8E could be mixed with Paraquat and a surfactant to replace Lasso and Lorox and told plaintiff the amount of Dual 8E to use; plaintiff decided to use Dual 8E based on his past dealings with Farm Chemical and the employee's recommendations; plaintiff mixed the chemicals in accordance with the employee's instructions; the Dual 8E was ineffective in killing crabgrass; and there was evidence that Dual 8E must be mixed with Sencor, Lexone or Lorox and either Ortho Paraquat or Roundup.

APPEAL by plaintiff and cross appeal by defendants from *Smith (Donald), Judge*. Judgment entered 15 November 1985 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 20 August 1986.

This is a civil action wherein plaintiff seeks to recover \$29,026.50 in damages for breach of express and implied warranties. In his complaint, plaintiff alleged that defendant Farm Chemical Corporation (hereinafter Farm Chemical) breached warranties made by its sales representative, relating to the effectiveness of Dual 8E, which is manufactured by defendant Ciba-Geigy Corporation (hereinafter Ciba-Geigy) and was sold by Farm Chemical to plaintiff for use in the no-till cultivation of soybeans. Plaintiff further alleged that Ciba-Geigy breached the implied warranty of merchantability and an express warranty that Dual 8E was reasonably fit for weed control in the no-till cultivation of soybeans. Farm Chemical filed an answer wherein it denied that its sales representative made any warranties concerning the use of Dual 8E in the no-till production of soybeans. Ciba-Geigy filed an answer, denying that it had made any warranties as alleged by plaintiff and alleging that it had expressly disclaimed any express or implied warranties. On 2 April 1984, plaintiff filed a motion to amend his complaint to allege that Ciba-Geigy negligently failed to supply plaintiff with an available label containing specific instructions for the no-till cultivation of soybeans. Plaintiff's motion was denied.

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**Tyson v. Ciba-Geigy Corp.**

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At trial, plaintiff introduced evidence tending to show the following: Plaintiff and his son, Vance Tyson, are farmers in Cumberland County and decided in 1980 to increase their no-till cultivation of soybeans to 145 acres. Plaintiff telephoned Farm Chemical to order the herbicides Lasso and Lorox. Plaintiff explained the characteristics of the land that he intended to use for no-till farming to a sales representative of Farm Chemical. The sales representative told plaintiff that a new herbicide, Dual 8E, when mixed with Paraquat and a surfactant, would work as well as the combination of Lasso and Lorox, would be less risky to use on his type of land, and would be less expensive. The employee gave plaintiff instructions on mixing the chemicals and told plaintiff that he should use one and a half to two pints of Dual 8E per acre. Plaintiff ordered thirty-five gallons of Dual 8E, based on the recommendation of the employee. Plaintiff received the shipment of Dual 8E from Farm Chemical on 10 June 1980 and began planting within the following two days. Vance Tyson testified that he read the label on the Dual 8E containers before mixing it with the other chemicals and that a table on the label indicated that, when using Dual 8E alone, one and a half to two pints per acre would be necessary to cultivate plaintiff's type of land. He further testified that he mixed the Dual 8E with Paraquat and a surfactant, as instructed by the employee of Farm Chemical, although the label on the Dual 8E did not indicate that it could be mixed with these chemicals. Ten to fifteen days after planting the soybeans, crabgrass began to emerge. Attempts to kill the crabgrass were unsuccessful and the average yield of soybeans from the 145 acres planted using Dual 8E was six to eight bushels per acre. Plaintiff introduced into evidence a letter from a representative of Ciba-Geigy and a sample label which was available when purchasing the Dual 8E, but was not given to plaintiff, which indicate that in the no-till cultivation of soybeans, Dual 8E should be applied in conjunction with Sencor, Lexone or Lorox and either Ortho Paraquat CL or Roundup.

At the end of his evidence, plaintiff made a motion to amend the complaint to conform to the evidence to allege that the conduct of defendants constituted unfair and deceptive trade practices in violation of G.S. 75-1.1 and that defendants had negligently failed to properly instruct plaintiff on the use of Dual 8E in the no-till cultivation of soybeans. The trial court allowed the

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Tyson v. Ciba-Geigy Corp.

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motion to amend to allege unfair and deceptive trade practices, but denied the motion to amend to allege negligence. Defendants made motions for directed verdicts, which the trial court allowed.

From a judgment directing a verdict as to plaintiff's claims, plaintiff appealed. Defendants gave notice of appeal from the order allowing plaintiff's motion to amend the complaint to allege unfair and deceptive trade practices.

*Thorp and Clarke, by Herbert H. Thorp, for plaintiff, appellant, cross-appellee.*

*Smith Helms Mulliss & Moore, by Alan W. Duncan, for defendant, appellee, cross-appellant, Ciba-Geigy Corporation.*

*Willcox & McFadyen, by Duncan B. McFadyen, III, for defendant, appellee, cross-appellant, Farm Chemical Corporation.*

HEDRICK, Chief Judge.

[1] Plaintiff first assigns error to the trial court's denial of his pretrial motion to amend his complaint to allege negligence, made over a year and a half after the original complaint was filed. G.S. 1A-1, Rule 15(a) gives the trial court broad discretion in determining whether leave to amend will be granted after the time for amending as a matter of course has expired. *Willow Mountain Corp. v. Parker*, 37 N.C. App. 718, 247 S.E. 2d 11, *disc. rev. denied*, 295 N.C. 738, 248 S.E. 2d 867 (1978). The denial of such a motion is not reviewable absent a clear showing of abuse of discretion. *Garage v. Holston*, 40 N.C. App. 400, 253 S.E. 2d 7 (1979). We find no such abuse of discretion and this assignment of error is overruled.

[2] Plaintiff also assigns error to the trial court's denial of his motion pursuant to G.S. 1A-1, Rule 15(b) to amend to allege negligence, made at the close of plaintiff's evidence. Plaintiff contends that the issue of negligence was tried by implied consent and, therefore, that the trial court erred in denying his motion to amend to conform to the evidence. We disagree.

G.S. 1A-1, Rule 15(b) provides, in pertinent part, as follows: "When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." In *Eudy v.*

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**Tyson v. Ciba-Geigy Corp.**

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*Eudy*, 288 N.C. 71, 77, 215 S.E. 2d 782, 786-87 (1975), our Supreme Court discussed the application of G.S. 1A-1, Rule 15(b) as follows:

[T]he implication of Rule 15(b) . . . is that a trial court may not base its decision upon an issue that was tried inadvertently. Implied consent to the trial of an unpleaded issue is not established merely because evidence relevant to that issue was introduced without objection. At least it must appear that the parties understood the evidence to be aimed at the unpleaded issue.

(Citations omitted.) Where the evidence which supports an unpleaded issue also tends to support an issue properly raised by the pleadings, no objection to such evidence is necessary and the failure to object does not amount to implied consent to try the unpleaded issue. *Munchak Corp. v. Caldwell*, 37 N.C. App. 240, 246 S.E. 2d 13, *disc. rev. denied*, 295 N.C. 647, 248 S.E. 2d 252 (1978). The trial court's ruling on a motion to amend pursuant to G.S. 1A-1, Rule 15(b) is not reviewable on appeal absent a showing of abuse of discretion. *Evans v. Craddock*, 61 N.C. App. 438, 300 S.E. 2d 908 (1983).

In the present case, the evidence cited by plaintiff in support of the issue of negligence also supports the allegations of breach of warranty, which were raised by the pleadings. Defendants' failure to object to such evidence, therefore, did not amount to implied consent to try the issue of negligence. The trial court did not abuse its discretion in denying plaintiff's second motion to amend to allege negligence.

[3] Plaintiff assigns as error the trial court's granting of defendants' motions for directed verdict. Plaintiff first argues in support of this assignment of error that the evidence is sufficient for the jury to find that Ciba-Geigy breached an express warranty on the Dual 8E label that the product was reasonably fit for the purposes referred to in the directions for use. This argument is without merit. The label attached to the Dual 8E delivered to plaintiff contained the following express warranty: "CIBA-GEIGY warrants that this product conforms to the chemical description on the label and is reasonably fit for the purposes referred to in the Directions for Use." Under the "Directions for Use" the label instructs, "In soybeans, it [Dual 8E] may be applied alone or in combination with Sencor, Lexone, or Lorox in water or fluid fer-

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**Tyson v. Ciba-Geigy Corp.**

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tilizer with conventional ground sprayers." The label also contains tables describing the necessary amount of Dual 8E per acre when using Dual 8E alone or in conjunction with Sencor, Lexone or Lorox. The label does not contain directions for mixing Dual 8E with Paraquat and a surfactant. Vance Tyson testified that he mixed the Dual 8E with Paraquat and a surfactant and that he did not mix the Dual 8E in accordance with the directions for use on the label. The record contains no evidence tending to show that the Dual 8E was not fit for the purposes referred to in the directions for use, and thus there is no evidence that this express warranty was breached by Ciba-Geigy.

[4] Plaintiff also contends that Ciba-Geigy breached the implied warranty of merchantability and this warranty was ineffectively disclaimed on the Dual 8E label. This contention is also without merit.

G.S. 25-2-316(2) provides, in pertinent part, as follows: "to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous." G.S. 25-1-201(10) provides that whether a term or clause is "conspicuous" is for decision by the court and that language in the body of a form is "conspicuous" if it is in larger or contrasting type or color.

The label on the Dual 8E in the present case contains the following language: "CIBA-GEIGY makes no other express or implied warranty of Fitness or Merchantability or any other express or implied warranty." This language is in darker and larger type than the other language on the label and is therefore "conspicuous," as defined by G.S. 25-1-201(10). We hold, therefore, that Ciba-Geigy effectively disclaimed any implied warranties of merchantability or fitness.

[5] Plaintiff argues that he presented sufficient evidence for the jury to find that Farm Chemical breached express warranties relating to the effectiveness of Dual 8E to kill crabgrass in the no-till cultivation of soybeans. Plaintiff contends that the statements of the sales representative of Farm Chemical that the Dual 8E, when mixed with Paraquat and a surfactant, would "do a good job" created an express warranty.

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Tyson v. Ciba-Geigy Corp.

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G.S. 25-2-313(1)(a) provides that "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." A salesman's expression of his opinion in "the puffing of his wares" does not create an express warranty. *Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E. 2d 161 (1972). Thus, statements such as "supposed to last a lifetime" and "in perfect condition" do not create an express warranty. *Id.* Similarly, the statement made by the salesman in the present case that the Dual 8E would "do a good job" is a mere expression of opinion and did not create an express warranty.

[6] Finally, plaintiff contends that the trial court erred in granting defendant Farm Chemical's motion for directed verdict on the issue of breach of implied warranty. We agree with this contention. G.S. 25-2-315 defines implied warranty of fitness for particular purpose as follows:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section [Sec. 25-2-316] an implied warranty that the goods shall be fit for such purpose.

The evidence in the present case, when considered in the light most favorable to plaintiff, tends to show that plaintiff contacted defendant Farm Chemical to order the herbicides Lasso and Lorox, for the no-till cultivation of soybeans. He spoke with Mr. Gregory, an employee of Farm Chemical, on the telephone and told him that he was planning the no-till cultivation of soybeans on 145 acres of his land and described the type of soil on the land. Mr. Gregory gave Dual 8E a good recommendation and told plaintiff that it would "do a good job," would be less expensive to use than the chemicals he had used the previous year and would also be less risky to use on plaintiff's type of land. He further told plaintiff that Dual 8E could be mixed with Paraquat and a surfactant to replace Lasso and Lorox. He also told plaintiff the amount of Dual 8E per acre that he should use. Plaintiff testified that based upon Mr. Gregory's recommendation and his past business dealings with Farm Chemical, he decided to use Dual 8E and



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**Tyson v. Ciba-Geigy Corp.**

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ordered thirty-five gallons from Farm Chemical. Vance Tyson testified that he mixed the chemicals in accordance with Mr. Gregory's instructions, but that the Dual 8E was ineffective in killing crabgrass. Plaintiff also introduced evidence tending to show that Dual 8E must be mixed with Sencor, Lexone or Lorox and either Ortho Paraquat CL or Roundup. This evidence is sufficient to support a finding that the seller, Farm Chemical, had reason to know of the particular purpose, the no-till cultivation of soybeans, for which the product was required and that plaintiff was relying on its recommendation when he ordered the Dual 8E. There is no evidence in the record indicating that defendant Farm Chemical disclaimed any warranties relating to the Dual 8E. Thus, the evidence in the record is sufficient for a jury to find that Farm Chemical made an implied warranty relating to the fitness of the Dual 8E for plaintiff's purpose and that this warranty was breached. We hold, therefore, that the trial court erred in directing a verdict for defendant Farm Chemical on the issue of breach of an implied warranty of fitness for particular purpose.

By their cross-appeal, defendants contend that the trial court erred in allowing plaintiff's motion to amend his complaint made at the end of plaintiff's evidence to allege that defendants' acts constituted unfair and deceptive trade practices in violation of G.S. 75-1.1. After the trial court allowed plaintiff's motion to amend, it allowed defendants' motions for directed verdict on all issues. In plaintiff's appeal, he has not contended that the trial court erred in granting defendants' motions for directed verdict on the issue of unfair and deceptive trade practices. Therefore, it is unnecessary for us to address defendants' assignment of error on cross-appeal.

For the foregoing reasons, directed verdict for defendant Ciba-Geigy Corporation is affirmed. Directed verdict for defendant Farm Chemical is reversed and remanded for a new trial with respect to plaintiff's claim for breach of an implied warranty of fitness for particular purpose as to defendant Farm Chemical and any and all damages resulting therefrom.

Affirmed in part, reversed in part.

Judges WEBB and WELLS concur.

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**Furr v. Carmichael**

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JERRY S. FURR AND WIFE, PATRICIA D. FURR v. BETTY K. CARMICHAEL  
AND ANNIE CARMICHAEL

No. 8521DC991

(Filed 2 September 1986)

**1. Courts § 9.4— motion for summary judgment—previously heard by another judge—consideration improper**

The trial court erred by granting a partial summary judgment for plaintiffs on the issue of fraud where the issues before the court were the same as the issues previously heard by another judge who had ruled that there were triable issues of material fact and no new evidence was filed or presented by either party.

**2. Vendor and Purchaser § 2— real estate sales contract—failure to close in reasonable time—directed verdict improper**

The trial court erred by directing a verdict for plaintiffs in an action for the specific performance of a real estate contract where plaintiffs and defendant entered into a real estate sales contract on 25 August; the written contract did not recite a closing date and did not indicate in any way that time was of the essence; defendant asked to be able to collect the September rent payment from the tenant living in the house and did so; defendant testified that she attempted to close on the property at least ten times in September; defendant wrote to plaintiff on 13 October indicating that she was no longer willing to go through with the sale and refunding the earnest money; and defendant sold the property to Annie Carmichael. The court could not say under the facts of this case that 49 days was a reasonable time as a matter of law within which to close on the property.

APPEAL by plaintiffs and defendant Betty K. Carmichael from *Gatto, Judge*. Judgment entered 29 May 1985 in District Court, FORSYTH County. Heard in the Court of Appeals 5 February 1986.

This is a civil action seeking specific performance of a real estate sales contract, executed on 25 August 1983, wherein the defendant Betty K. Carmichael contracted to sell to plaintiffs a house and lot located at 3920 Waddill Street in Winston-Salem, North Carolina. The Complaint, filed 1 November 1983, alleged that after the execution of the contract, and while the plaintiffs were ready, willing and able to perform, defendant Betty K. Carmichael willfully refused to accept the purchase price tendered by plaintiffs and fraudulently and without valuable consideration conveyed the subject property to the defendant, Annie Carmichael. Plaintiffs further alleged that defendants conspired to defraud the

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**Furr v. Carmichael**

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plaintiffs of their contractual rights. Plaintiffs prayed the court to enter an order of specific performance and to set aside the conveyance of the subject property from Betty K. Carmichael.

In their answer and counterclaim filed 29 November 1983, defendants denied the existence of a valid and binding contract between the defendant, Betty K. Carmichael, and plaintiffs and pled nonfulfillment of the Statute of Frauds as a bar to recovery. In the "Third Defense," defendant Betty K. Carmichael alleged that the contract had no provision for a closing date; the parties had orally agreed for the closing to be immediately, and because plaintiffs failed to close on the property on numerous dates in September 1983, plaintiffs breached the contract, thereby justifying rescission of the contract by her on 10 October 1983 and entitling her to money damages. In the "Fourth Defense," both defendants alleged that on 1 November 1983, after plaintiffs knew or should have known there was no contract for sale of the aforesaid property, plaintiffs intentionally and maliciously filed against the property a "Notice of Lis Pendens." Defendants sought both actual and punitive damages for this slander of title and breach of contract. Plaintiffs filed a response 9 December 1983, denying an oral agreement to close "immediately."

On 13 March 1984, plaintiffs filed a summary judgment motion seeking summary judgment in their favor on their claim and defendants' counterclaim. Chief Judge Abner Alexander found "that there are tryable [sic] issues of fact as to the Plaintiff's claim against the Defendant and the Plaintiff's Motion for Summary Judgment on that claim is denied [and] with regard to the Defendant's counterclaim against the Plaintiff, that there are no material issues of fact and the Plaintiff is entitled to judgment on the counterclaim as a matter of law."

On 21 August 1984, defendants filed a motion for total summary judgment, asserting that the contract was too indefinite to be specifically enforced, or in the alternative, a motion for partial summary judgment on the issue of fraud. By Order, entered 17 September 1984, Judge James A. Harrill, Jr., denied the motion for total summary judgment, but found that "defendants are entitled to a partial summary judgment as a matter of law on the issue of fraud and that plaintiffs' claim for fraud and same is hereby dismissed."

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**Furr v. Carmichael**

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The case was tried before a judge and jury. At the close of plaintiffs' evidence and again at the close of all the evidence, plaintiffs moved for a directed verdict. At the close of all the evidence, Judge Joseph Gatto granted plaintiffs' motion and entered a judgment which read in part as follows:

[T]he Court being of the opinion that the motion should be partially granted as to specific performance of the real estate contract by the Defendant, Betty K. Carmichael; the Court is further of the opinion that the motion cannot be granted with regard to the voiding of the conveyance from Betty K. Carmichael to Annie Carmichael because of an Order granting partial summary judgment entered herein by The Honorable James A. Harrill, Jr., on or about September 9, 1984.

Judge Gatto ordered defendant Betty K. Carmichael, upon payment of the purchase price, to convey to plaintiffs any interest she has or may have in the subject property and denied plaintiffs' motion asking that the conveyance from Betty K. Carmichael to Annie Carmichael be declared void for the reason previously stated. Plaintiffs and defendant Betty K. Carmichael appealed.

*Peebles and Schramm by John J. Schramm, Jr., for plaintiffs-appellants.*

*Hutchins, Tyndall, Doughton and Moore by Laurie H. Woltz for defendants-appellees.*

PARKER, Judge.

I. PLAINTIFFS' APPEAL

[1] Plaintiffs first argue that the trial court erred in entering the 17 September 1984 Order granting defendants' partial summary judgment on the issue of fraud and dismissing plaintiffs' claim for fraud. Plaintiffs contend, and we agree, that the issues before the court on defendants' motion for summary judgment were the same issues that were before the court on plaintiffs' motion heard by Judge Alexander and that his finding that there were triable issues of material fact precluded entry of partial summary judgment for defendants on their later motion.

The general rule was stated by this Court in *American Travel Corp. v. Central Carolina Bank*, 57 N.C. App. 437, 440, 291

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Furr v. Carmichael

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S.E. 2d 892, 894, *cert. denied*, 306 N.C. 555, 294 S.E. 2d 369 (1983) as follows:

Under the authority of *Carr v. Carbon Corp.*, 49 N.C. App. 631, 272 S.E. 2d 374 (1980), *disc. rev. denied*, 302 N.C. 217 (1981), a motion for summary judgment denied by one superior court judge may not be allowed by another superior court judge on identical legal issues. *See also Biddix v. Construction Corp.*, 32 N.C. App. 120, 230 S.E. 2d 796 (1977). This rule is based on the premise that no appeal lies from one superior court judge to another. Moreover, as pointed out in *Carr*, to allow an unending series of motions for summary judgment "would defeat the very purpose of summary judgment procedure, to determine in an expeditious manner whether a genuine issue of material fact exists and whether the movant is entitled to judgment on the issue presented as a matter of law." 49 N.C. App. at 634, 272 S.E. 2d at 377.

Generally, motions for summary judgment should not be heard until all parties are prepared to present their contentions on all issues. *Id.* at 441, 291 S.E. 2d at 895. In the instant case, defendants did not move for summary judgment or ask for a continuance when plaintiffs' motion was heard. On the record before this Court, no new affidavit or evidence based on discovery was filed or presented by either party at the hearing on defendants' motion for summary judgment that was not before the trial court at the hearing on plaintiffs' motion for summary judgment. Therefore, when Judge Harrill considered defendants' motion for summary judgment, he was in effect reviewing what Judge Alexander had considered earlier, to wit: whether a triable issue of material fact existed as to plaintiffs' claim for specific performance arising out of breach of contract and fraudulent conveyance. Judge Alexander ruled that there were triable issues of fact as to these claims; he did not rule that there were no issues of fact, but that plaintiffs were barred as a matter of law. By entering partial summary judgment on the issue of fraud, Judge Harrill overruled Judge Alexander's earlier order finding triable questions of fact on that issue. Judge Harrill erred in granting partial summary judgment for defendants on the issue of fraud, and the 17 September 1984 order is vacated.

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Furr v. Carmichael

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Because of our disposition of defendant Carmichael's appeal, we do not address plaintiffs' other assignment of error.

## II. DEFENDANT BETTY K. CARMICHAEL'S APPEAL

[2] In her first assignment of error, defendant contends the trial court erred in directing a verdict in favor of plaintiffs. We agree.

The following facts are undisputed. On 25 August 1983, the plaintiffs and this defendant entered into a real estate sales contract. The written contract does not recite a closing date and does not indicate in any way that time is of the essence with regard to closing. This defendant asked to be allowed to collect the September rent payment from the tenant living in the house and did collect this payment. This defendant wrote a letter to Mr. Furr on 13 October 1983 indicating that she was no longer willing to go through with the sale and refunding his earnest money deposit. This defendant sold and conveyed the property which was the subject of the real estate contract to the defendant Annie Carmichael. Defendant contends it was improper to remove the case from the jury because there was a triable issue as to reasonable time of performance. Defendant's position is that the jury should have decided whether the 49-day interval between 25 August 1983 and 13 October 1983 was a reasonable time to perform.

Where an option or contract to purchase does not specify the time within which the right to buy may be exercised, the right must be exercised within a reasonable time. *Lewis v. Allred*, 249 N.C. 486, 106 S.E. 2d 689 (1959). Though the determination of reasonable time is generally a mixed question of law and fact and thus for the jury, it becomes a question of law when the facts are simple and admitted and only one inference can be drawn. *Yancey v. Watkins*, 17 N.C. App. 515, 195 S.E. 2d 89, cert. denied, 283 N.C. 394, 196 S.E. 2d 277 (1973). Time is ordinarily not of the essence of a contract of sale and purchase. *Douglass v. Brooks*, 242 N.C. 178, 87 S.E. 2d 258 (1955). By directing a verdict in plaintiffs' favor, the trial court ruled that forty-nine (49) days was not an unreasonable time, as a matter of law, to close on the property.

In *Cadillac-Pontiac Co. v. Norburn*, 230 N.C. 23, 51 S.E. 2d 916 (1949), the parties entered into a contract to buy and sell land. The contract provided: "It is agreed that settlement under this

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Furr v. Carmichael

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contract shall be completed on or before November 20, A.D. 1945." The court held that time was not of the essence of this agreement because "[t]he agreement itself is not worded to avoid the contract altogether or expressly vitiate it, if settlement is not made at that time." *Id.* at 29, 51 S.E. 2d at 920. Similarly, in *Walker v. Weaver*, 23 N.C. App. 654, 209 S.E. 2d 537 (1974), this Court held that time was not of the essence in a contract to purchase real estate where the contract provided that it was "to be definitely closed within a period of—30—days . . ." since the statement did not indicate any intention of the contracting parties that all rights and obligations were to terminate if, through no fault of either vendors or vendees, the sale could not be closed exactly within the time prescribed. See also *Taylor v. Bailey*, 34 N.C. App. 290, 237 S.E. 2d 918 (1977), where this Court held that time was not of the essence in a land contract, and the failure to close on or before 15 October 1975 as specified in the contract did not void the defendant-seller's obligations under the contract. These later cases indicate that a closing within a reasonable period of time was sufficient even in the face of specific closing dates where nothing else appeared to indicate that time was of the essence of the contract.

In passing upon a motion for a directed verdict, the court must consider the evidence in the light most favorable to the non-movant, *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973), and all discrepancies must be resolved in favor of the party against whom the motion was made. *Odell v. Lipscomb*, 12 N.C. App. 318, 183 S.E. 2d 299 (1971). When the question of granting a directed verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and allow the case to be submitted to the jury. *Koonce v. May*, 59 N.C. App. 633, 298 S.E. 2d 69 (1982).

Under the facts of this case, and in light of defendant Betty K. Carmichael's testimony that she attempted to close on the property at least ten times during the month of September, we are unable to say that forty-nine (49) days was a reasonable time as a matter of law within which to close on this property. Clearly, more than one inference can be drawn from the facts presented herein. The issue of reasonable time is for the jury. Accordingly, Judge Gatto erred in directing a verdict in favor of plaintiffs.

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**Wagner v. Barbee and Seiler v. Barbee**

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To summarize our holding:

The order granting partial summary judgment entered on 17 September 1984 is vacated.

The directed verdict granted at the close of all of the evidence in favor of plaintiff is reversed.

This cause is hereby remanded to the District Court of Forsyth County for a trial by jury on all issues raised by the pleadings except defendants' counterclaim for slander of title from which defendants did not appeal.

Reversed and remanded.

Chief Judge HEDRICK and Judge WEBB concur in the result.

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SHEREE L. WAGNER, PLAINTIFF v. DONAL LEE BARBEE, SR., LOTTIE D. BARBEE AND DONAL LEE BARBEE, JR., DEFENDANTS AND THIRD PARTY PLAINTIFFS v. ALFRED R. SEILER, JR., THIRD PARTY DEFENDANT

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ALFRED R. SEILER, JR., PLAINTIFF v. DONAL LEE BARBEE, JR., AND UNIVERSAL INSURANCE COMPANY, DEFENDANTS

No. 863SC192

(Filed 2 September 1986)

**1. Automobiles and Other Vehicles § 46.1— automobile collision—officer's opinion of point of impact—no prejudice**

There was no prejudicial error in an action arising from a collision between an automobile and a motorcycle in the admission of the opinion testimony of the officer who investigated the accident regarding the point of impact of the vehicles because all parties agreed at trial that the collision occurred in the east lane of Highway 58 in accordance with the officer's testimony.

**2. Automobiles and Other Vehicles § 46.1— automobile collision—officer's opinion of how accident occurred—no prejudice**

There was no prejudice to defendant in an action arising from a collision between an automobile and a motorcycle in the admission of the investigating officer's opinion testimony about how the accident occurred because the testimony corroborated the testimony of defendant.



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**Wagner v. Barbee and Seiler v. Barbee**

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**3. Automobiles and Other Vehicles § 46.1— automobile collision—opinion of doctor regarding blood alcohol level—no prejudice**

In an action arising from a collision between an automobile and a motorcycle, there was no prejudice in the admission of a doctor's opinion testimony regarding the blood level of plaintiff Wagner because Wagner was a passenger on the motorcycle and there was no evidence that her blood alcohol content in any way caused the accident or contributed to her injuries.

**4. Automobiles and Other Vehicles § 45.1— automobile collision—criminal citation—admission not prejudicial**

In an action arising from a collision between a motorcycle and an automobile, there was no prejudice in the admission of testimony and a citation showing that defendant was charged with operating a motor vehicle while under the influence of an intoxicating beverage where there was other evidence tending to show that defendant was intoxicated when the accident occurred.

**5. Automobiles and Other Vehicles § 45.3— automobile accident—passenger intoxicated months after accident—properly excluded**

In an action arising from a collision between an automobile and a motorcycle, the trial court properly excluded evidence that plaintiff Wagner had been intoxicated on two occasions four and nine months after the accident; defendant failed to demonstrate how evidence that Wagner was intoxicated on those two occasions is relevant to the injuries for which she sought recovery. N.C.G.S. § 8C-1, Rule 402.

**6. Judgments § 55— prejudgment interest—defendant partially uninsured—interest on full judgment erroneous**

The trial court erred in an action arising from an automobile collision by awarding prejudgment interest on the principal amount of the judgment, \$275,000, where defendant's liability insurance provided coverage up to \$50,000. N.C.G.S. § 24-5.

**APPEAL** by defendant Donal Lee Barbee, Jr., from *Freeman, Judge*. Judgments entered 26 August 1985 in Superior Court, CARTERET County. Heard in the Court of Appeals 19 August 1986.

These are civil actions wherein plaintiffs, Alfred Seiler and Sheree Wagner, seek to recover damages for injuries and expenses arising out of a collision on 17 February 1983 between a motorcycle driven by Seiler carrying Wagner as a passenger and an automobile driven by defendant Donal Lee Barbee, Jr. Both plaintiffs alleged in their complaints that defendant's negligence in operating the automobile was the proximate cause of the collision and their personal injuries and damage to the motorcycle. Defendant filed answers wherein he denied the allegations that

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**Wagner v. Barbee and Seiler v. Barbee**

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the collision was the result of his negligence and alleged in defense that Seiler's negligence in operating his motorcycle was the proximate cause of his injuries and Seiler's negligence was imputed to Wagner because she willfully and knowingly assumed a dangerous position. Defendant also filed a counterclaim against Seiler alleging that the accident was the result of Seiler's negligent operation of his motorcycle and seeking to recover damages for personal injury and loss of value of his vehicle.

On 11 July 1984, the trial judge entered an order consolidating the cases for trial. The evidence introduced at trial tends to show the following: At approximately 1:00 a.m. on 17 February 1983, plaintiffs, Seiler and Wagner, were involved in a motor vehicle collision with defendant. The collision occurred on Highway 58 in Atlantic Beach, North Carolina. Seiler was driving a motorcycle and Wagner was riding on the motorcycle as a passenger. Defendant was driving his automobile in an easterly direction on Highway 58 when the collision occurred. Plaintiffs introduced evidence tending to show that they were also traveling easterly on Highway 58 when defendant, who was intoxicated, hit the motorcycle in the rear. Defendant presented evidence tending to show that while he was driving, he suddenly saw a motorcycle without any lights on "sitting with the front wheels center lane and the rear of the bike in my lane." He testified that he hit the brakes as soon as he saw the motorcycle and turned the steering wheel of his automobile to the right, but was unable to avoid colliding with the motorcycle.

Pursuant to the issues submitted, the jury found that both plaintiffs were injured by defendant's negligence and that Seiler did not contribute to his own or to Wagner's injuries. The jury further found that Wagner was entitled to recover \$275,000 for her personal injuries and that Seiler was entitled to recover \$5,000 for his personal injuries, and that neither plaintiff was entitled to recover punitive damages. From judgments entered on the verdicts, ordering that defendant pay plaintiff Wagner \$275,000 together with interest at the legal rate from 4 November 1983 until paid and pay plaintiff Seiler \$5,000 also with interest from 4 November 1983 until paid, defendant Donal Lee Barbee, Jr., appealed.

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Wagner v. Barbee and Seiler v. Barbee

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*L. Patten Mason for plaintiffs, appellees.*

*Wheatly, Wheatly, Nobles & Weeks, P.A., by Stevenson L. Weeks, for defendant, appellant.*

*Stith and Stith, P.A., by F. Blackwell Stith and Susan McIntyre, for third party defendant, appellee Seiler.*

HEDRICK, Chief Judge.

[1] By assignment of error No. 1, defendant contends that the trial court erred in admitting the opinion testimony of Brian Rowe, the police officer who investigated the accident, in regard to where the point of impact of the vehicles occurred on the highway. Assuming that the trial court erred in this regard as defendant contends, this error was clearly not prejudicial because all the parties agreed at trial that the collision occurred in the east lane of Highway 58 in accordance with Officer Rowe's testimony.

[2] Defendant next contends that the trial court erred in admitting the opinion testimony of Officer Rowe about how the accident occurred. In response to defense counsel's question on cross-examination regarding the damage to the motorcycle, Officer Rowe testified that "[i]f he [defendant] was going down the road and swerved off to the right-hand side of the road, it would hit it just like just the way it appears in these pictures." This testimony corroborates the testimony of defendant that he turned the car to the right to try and avoid hitting the motorcycle. Thus, defendant has again failed to show that he was prejudiced by Officer Rowe's testimony.

[3] Defendant next contends that the trial court erred in admitting the opinion testimony of Dr. Nicholson regarding the blood alcohol level of plaintiff Wagner when she was taken to the hospital following the accident. Defendant argues that the doctor was not qualified to give an opinion on this matter, because he responded to the request for his opinion as follows: "I am not a pathologist who specializes in these tests and I don't know the technique required, but I rely upon my pathological colleagues." Over defendant's objection, Dr. Nicholson was allowed to testify that in his opinion Wagner's test indicating the alcohol level in her blood was a mistake because it was so high and to explain how such a mistake could have been made. Again, assuming for

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**Wagner v. Barbee and Seiler v. Barbee**

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the sake of argument that the trial court erred in overruling defendant's objection, defendant has failed to demonstrate that this error was prejudicial. Defendant does not argue, nor is there any evidence tending to show, that the high blood alcohol content of plaintiff Wagner, who was a passenger on the motorcycle, in any way caused the accident or contributed to her injuries. This assignment of error is overruled.

[4] By assignments of error Nos. 4 and 6, defendant contends that the trial court erred in admitting testimony and a criminal citation showing that defendant was charged as a result of the accident with operating a motor vehicle while under the influence of an intoxicating beverage. Once again, defendant has failed to show that the ruling of the trial court, if erroneous, was prejudicial. Defendant concedes that testimony that he pleaded guilty to the charge arising out of this incident of reckless driving after consumption of an alcoholic beverage was admissible. Officer Rowe testified that in his opinion defendant was under the influence of an alcoholic beverage at the scene of the accident and had appeared intoxicated at a bar where the officer saw him two hours before the accident. The breathalyzer operator who administered the breathalyzer test after defendant's arrest also testified that defendant appeared to be intoxicated and that defendant's blood alcohol level was 0.12. Given all of the evidence tending to show that defendant was intoxicated when the accident occurred, defendant could not have been prejudiced by evidence that he was charged with driving under the influence of an intoxicating beverage.

[5] Defendant next contends that the trial court erred in refusing to admit evidence relating to plaintiff Wagner's intoxication on two occasions four and nine months after the accident. Defendant contends that this evidence is relevant to the issue of the nature and severity of plaintiff's injuries. We disagree. Plaintiff Wagner testified at trial that after she left the hospital in March 1983, she continued to suffer from loss of mobility in some of her limbs, had difficulty breathing and has permanent scars. Defendant has failed to demonstrate how evidence that Wagner was intoxicated on two occasions in June and December of 1983 is relevant to the issues of the injuries for which she seeks to recover in the present case. The trial court, therefore, properly excluded this evidence. G.S. 8C-1, Rule 402.

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**Wagner v. Barbee and Seiler v. Barbee**

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[6] Defendant assigns error to the trial court's order that defendant pay plaintiff Wagner prejudgment interest on \$275,000, the principal amount of the judgment. Defendant contends that the trial court erred in awarding prejudgment interest to that portion of the award which was not covered by his liability insurance. We agree.

The provisions of G.S. 24-5, which were controlling at the time this action was filed, provided in pertinent part as follows:

The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract shall bear interest from the time the action is instituted until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly. The preceding sentence shall apply only to claims covered by liability insurance. The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract which are not covered by liability insurance shall bear interest from the time of the verdict until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly.

In *Leary v. Nantahala Power and Light Co.*, 76 N.C. App. 165, 332 S.E. 2d 703 (1985), this Court held the trial court had erred in awarding prejudgment interest on the portion of the judgment excluded by the deductible in defendant's insurance policy. The *Leary* court reasoned that because defendant was a self-insurer to the extent of the deductible, the provisions of G.S. 24-5 did not apply to that portion of the judgment.

In the present case, defendant's liability insurance policy provided coverage for bodily injury up to \$50,000 per person. Thus, defendant was uninsured to the extent that the judgment for plaintiff Wagner exceeds \$50,000. Under the applicable provisions of G.S. 24-5, the portion of the judgment which is not covered by liability insurance, \$225,000 in this case, bears interest from the time of the verdict. Therefore, we hold that the trial court erred in awarding plaintiff Wagner prejudgment interest on the full judgment amount of \$275,000 from the time the action is instituted.

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In re Will of Leonard

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By his remaining assignments of error, defendant contends that the trial court erred in entering the judgments "due to errors committed by the court during the trial of this cause." In support of these assignments of error, defendant restates arguments relating to various evidentiary rulings by the trial court, which we have addressed above. These assignments of error present no additional questions for review.

For the reasons stated above, we find no prejudicial error in the trial, but remand the judgment in *Wagner v. Barbee*, Case No. 83CVS671, for entry of judgment in accordance with this opinion.

No error in trial, Case No. 83CVS671 remanded for entry of judgment in accordance with this opinion.

Judges PHILLIPS and MARTIN concur.

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IN THE MATTER OF THE WILL OF ZELLA MAY (MAE) LEONARD, DE-  
CEASED

No. 8622SC161

(Filed 2 September 1986)

**1. Witnesses § 1— voir dire—records of witness's commitment proceedings—properly considered**

The trial judge in a caveat proceeding did not err by considering on *voir dire* the records of a proposed witness's commitment proceedings. In deciding preliminary matters, the trial court will consider any relevant and reliable information that comes to its attention whether or not that information is technically admissible under the Rules of Evidence. N.C.G.S. § 8C-1, Rule 104(a).

**2. Witnesses § 1— caveat proceeding—competency of witness**

The trial judge did not abuse her discretion in a caveat proceeding by finding that a witness was incapable of remembering, understanding, and relating to the jury matters of detail concerning the holographic will where the witness could not remember having twice been involuntarily committed during the period of time about which she would have testified. N.C.G.S. § 8C-1, Rule 601(b)(1).

APPEAL by caveator from *Hyatt, Judge*. Judgment entered 18 November 1985 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 19 August 1986.

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In re Will of Leonard

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This is a caveat proceeding brought by the caveator, Roby Leonard, to contest the validity of a handwritten document offered for probate by his sister as the holographic will of their mother, Zella May (Mae) Leonard.

Zella May (Mae) Leonard died on 26 May 1982 survived by two adult children, Dorothy Mae Leonard, the propounder in this action, and Roby Clay Leonard, the caveator. The only evidence presented for purposes of this appeal is the testimony of Jessie Pearl Varner Kinney offered by the caveator. The propounder challenged Ms. Kinney's competency to testify and the court held a *voir dire* examination. During the *voir dire* examination, Ms. Kinney denied having a history of mental illness and denied that she had ever been involuntarily committed. The propounder then introduced, and the trial judge considered, records on file with the Davidson County Clerk of Court concerning involuntary commitment proceedings against Ms. Kinney. Those records show that she had been ordered hospitalized at Dorothea Dix Hospital in Raleigh in October 1965, November 1977, November 1978, December 1981, and January 1983. The records also show that another petition for the involuntary commitment of Ms. Kinney had been filed in December 1983 pursuant to which, it appears, she was ordered hospitalized in January 1984. In all of the proceedings after 1965 she was diagnosed as schizophrenic.

At the conclusion of the *voir dire* examination, the trial judge determined that Ms. Kinney was incompetent to testify. The trial judge found that Ms. Kinney had a history of mental illness, had been diagnosed as schizophrenic with symptoms of marked disorientation and hallucinations, had been involuntarily committed on the dates indicated in the records of the Davidson County Clerk of Court, and that her mental illness was a continuing problem for her. The court concluded that, because she was unable to remember her various commitment proceedings and hospitalizations, and because these events occurred during the same period of time as the events she would testify about, she was incapable of expressing herself on matters concerning Zella May (Mae) Leonard's will. Therefore, the trial judge ordered that Ms. Kinney not be allowed to testify. The jury returned a verdict for the proponent and the caveator appeals.

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In re Will of Leonard

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*Wilson, Biesecker, Tripp & Sink by Joe E. Biesecker for the caveator-appellant.*

*Brinkley, Walser, McGirt, Miller, Smith & Coles by Stephen W. Coles, for the propounder-appellee.*

EAGLES, Judge.

[1] The caveator assigns as error the fact that the trial judge considered the records of Ms. Kinney's commitment proceedings. The caveator argues that this is error for a number of reasons including that the court records are hearsay and that they were not properly authenticated, identified, tendered, and received into evidence. While those arguments are relevant on the issue of the records' admissibility into evidence for the fact finder to consider, they have no applicability to the issue of whether they may be considered by a trial judge conducting a *voir dire* examination to determine the competency of a witness.

G.S. 8C-1, Rule 104(a) provides, in part, that "[p]reliminary questions concerning the qualification of a person to be a witness . . . shall be determined by the court." This is in accord with North Carolina practice. See H. Brandis, *Brandis on North Carolina Evidence* Section 8 (1982). Rule 104(a) also provides that "[i]n making its determination it [the court] is not bound by the rules of evidence except those with respect to privileges." This last provision of the Rule is dispositive here. The Rule's plain meaning, the Commentary to the Rule, and sound judgment all contemplate that, in deciding preliminary matters, the trial court will consider any relevant and reliable information that comes to its attention, whether or not that information is technically admissible under the rules of evidence.

The rules of evidence are designed to facilitate the introduction into evidence of relevant information which will aid the trier of fact. When deciding preliminary matters such as the competency of a witness, however, the trial court is not acting as the trier of fact. Rather, it is deciding a threshold question of law, which lies mainly, if not entirely, within the trial judge's discretion. *State v. Robinson*, 283 N.C. 71, 194 S.E. 2d 811 (1973). *State v. Fields*, 315 N.C. 191, 337 S.E. 2d 518 (1985). Where competency is questioned, the trial judge is not required to conduct a formal hearing at which all of the rules of evidence are applicable. The



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In re Will of Leonard

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trial court must make only sufficient inquiry to satisfy itself that the witness is or is not competent to testify. The form and manner of that inquiry rests in the discretion of the trial judge.

[2] While the trial court's power to determine the competency of a witness is not an arbitrary one, there is no abuse of its discretion where there is evidence to support its ruling. Where there is a clear abuse of discretion, however, the ruling will be reversed. *Artesari v. Griffon*, 252 N.C. 463, 113 S.E. 2d 895 (1960). The remaining question then, is whether the trial judge abused her discretion in ruling Ms. Kinney incompetent to testify. We believe there is ample evidence to support the trial judge's ruling.

The competency of a witness is determined at the time the witness is called upon to testify. *State v. Cooke*, 278 N.C. 288, 179 S.E. 2d 365 (1971); *State v. Robinson*, 283 N.C. 71, 194 S.E. 2d 811 (1973); *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978). The test of competency is the capacity of the proposed witness to understand and to relate under oath the facts which will assist the jury in determining the truth with respect to the ultimate facts. *State v. Cooke, supra*. This is the applicable test even when the trial court finds, as it did here, that the witness is presently suffering from a mental illness. Even there, the witnesses may testify if they have sufficient understanding to apprehend their obligation to tell the truth and are able to give a correct account of the matters the witness seeks to testify about. *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970).

Our rules of evidence are also applicable in determining the competency of a witness. G.S. 8C, Rule 601(b) provides, in part, that

A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth. G.S. 8C-601(b) (1983).

Rule 601 makes no change in the basic rules of competency as they have been stated by our Supreme Court in the cases cited above. See H. Brandis, *Brandis on North Carolina Evidence* Section 55 (Supp. 1986). Therefore, unsoundness of mind is not *per se*

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In re Will of Leonard

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grounds for ruling a witness incompetent under Rule 601. Here, the trial court did not rely solely on its finding that Ms. Kinney was still suffering from schizophrenia. Instead, the trial judge seemed to rely more heavily on her answers to the *voir dire* questions. During the *voir dire* examination, Ms. Kinney denied having ever been involuntarily committed or having ever been the subject of commitment proceedings, she denied that she had ever been diagnosed as schizophrenic, and she denied having a history of mental illness. The records of Ms. Kinney's commitment proceedings, the accuracy of which the caveator does not challenge, directly contradict all of those denials. That fact, coupled with the trial court's finding that the events which she would testify to occurred around the time of the events she denied, led the trial court, using the language of Rule 601(b)(1), to conclude that Ms. Kinney was "incapable of expressing herself concerning matters to be understood."

In addition, a review of the *voir dire* transcript shows that the probative value of what Ms. Kinney would have said had she been allowed to testify is uncertain because her responses to questions were sometimes confusing. The discretion given to the trial court to determine a witness' competency is largely grounded on the ability of the trial judge to observe the witness' demeanor. See *State v. Fields, supra*. The importance of observing the witness cannot be overestimated. This is especially true in matters dealing with witness competency where the witness' tone and inflection of voice, the certainty with which the witness answers the question, and the general coherence of the witness' testimony are directly illustrative of the testimony's ability to aid the finder of fact.

The events and conversations which Ms. Kinney would have testified about occurred during the period of 1979-1982. It is clear that the trial judge did not abuse her discretion by finding that the witness was incapable of remembering, understanding, and relating to the jury, matters of detail concerning Ms. Leonard's holographic will, where the witness could not remember having twice been involuntarily committed during that same period of time.

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In re Stewart Children

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No error.

Judges ARNOLD and PARKER concur.

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IN THE MATTER OF THE STEWART CHILDREN: TAMMY DENISE STEWART, ROBERT JUNIOR STEWART AND RICCO DONNEL STEWART

No. 8526DC1085

(Filed 2 September 1986)

**1. Parent and Child § 1.6— termination of parental rights—prior finding of neglect—properly considered**

In a proceeding for termination of parental rights based on neglect, the trial court properly considered a prior order finding neglect but dismissing the termination petition because the court found that termination was not in the best interest of the children at that time. It was proper for the court to admit into evidence the order finding neglect as evidence that the children were neglected at that time, and the dismissal was not *res judicata* on the issue of neglect because it was not dismissed for lack of neglect.

**2. Parent and Child § 1.6— termination of parental rights—neglect—evidence sufficient**

The evidence of neglect was sufficient to support an order terminating parental rights where a prior order showed that respondent had been unable to adequately care for or supervise the children in January 1983, the evidence showed that at the time of the hearing respondent was still unable to care for or control her children because of her mental infirmity and young age, and the prognosis for her to develop the ability to adequately parent the children was very poor. N.C.G.S. § 7A-517(21).

APPEAL by Diane Stewart (now Reid), from *Harris, Judge*. Judgments announced 13 May 1985 and Orders entered 14 June 1985 in District Court, MECKLENBURG County. Heard in the Court of Appeals 12 March 1986.

*Ruff, Bond, Cobb, Wade & McNair* by Robert S. Adden, Jr., and William H. McNair for petitioner appellee, Mecklenburg County Department of Social Services.

Richard A. Lucey for respondent appellant, Diane Stewart Reid.

Gillespie & Lesesne by Donald S. Gillespie, Jr., Guardian Ad Litem for the children, appellees.

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In re Stewart Children

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COZORT, Judge.

This appeal arises from three orders of the District Court, Mecklenburg County, terminating the parental rights of the respondent, Diane Stewart Reid, on the grounds that she had neglected her children; that she left her children in foster care for more than 18 consecutive months without showing a positive response toward remedying the condition which led to their removal; and that she failed to pay a reasonable portion of support for the children for a continuous period of six months after they had been placed in the custody of the county Department of Social Services (DSS), G.S. 7A-289.32(2), (3) and (4). The parental rights of the biological fathers of the children were also terminated; however, neither father has appealed. The respondent contends, *inter alia*, that the trial court erred by allowing into evidence a prior order in a previous termination proceeding involving the same children which determined that the children were neglected but also found that it was not in the best interests of the children to terminate the mother's parental rights at that time. We affirm the decision of the district court.

In 1982, the eldest of the three Stewart children, Tammy Denise Stewart, was placed in legal and physical custody of the county Department of Social Services. Although legal custody was retained by DSS, the physical custody of Tammy was returned to her mother on 8 November 1982. On 1 February 1983, the district court reviewed Tammy's case and reviewed petitions filed by DSS for custody of Tammy's brothers, Robert and Ricco. The court determined that the children were neglected pursuant to G.S. 7A-517(21), and all three were removed from respondent's home.

On 17 June 1983 three separate termination petitions were filed seeking to terminate the parental rights of the biological parents of all three children. On 21 December 1983 the district court entered an order finding that the children were neglected and that grounds for termination existed; however, the court also found that it was not in the best interests of the children to terminate parental rights at that time. Accordingly, pursuant to G.S. 7A-289.31(b) the termination petitions were dismissed.

DSS retained custody of the Stewart children and placed them in Arosa House, a "half-way" house designed to provide

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In re Stewart Children

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supervision and counseling for children while allowing their parents to visit. The primary goal of Arosa House is to reunite the children with their parents.

The Stewart children lived in Arosa House for 11 months. During their stay, their mother was married to Dennis Reid. The children's mother and Mr. Reid visited them at Arosa House. The respondent's visits were regular for the most part. The counsellors at the Arosa House testified that although the respondent loved her children, she was unable to provide the proper discipline and care the children needed. In January 1985, all three children were placed in foster care.

A second petition to terminate the parental rights of the respondent was filed on 22 March 1985. The matter was heard on 7 May 1985 and 13 May 1985. On 14 June 1985 three written orders were entered terminating the parental rights of the respondent mother with respect to all three children. It is from these orders that respondent appeals.

[1] The respondent assigns error to the trial court's allowing the introduction of the 21 December 1983 order and the trial court's findings of fact which were based on that order. In addition the respondent contends that the 21 December 1983 order dismissing the termination petition was *res judicata* to all issues raised in that petition. We disagree.

The North Carolina Supreme Court has held that a prior order which adjudicates a parent of neglect may be admitted and considered by the trial court in a subsequent proceeding to terminate parental rights on the grounds of neglect. *In re Ballard*, 311 N.C. 708, 319 S.E. 2d 227 (1984); *In re Moore*, 306 N.C. 394, 293 S.E. 2d 127 (1982), *appeal dismissed*, 459 U.S. 1139, 74 L.Ed. 2d 987, 103 S.Ct. 776 (1983). In *Ballard*, the court found that the prior adjudication of neglect was not determinative on the issue of neglect existing at the time of the termination hearing. In determining whether there is neglect which authorizes the termination of parental rights, the trial court is allowed to consider a previous adjudication of neglect. It must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect. *Id.* at 715, 319 S.E. 2d at 232; *In re Byrd*, 72 N.C. App. 277, 280, 324 S.E. 2d 273, 276 (1985). "[A]ll previous orders in [a] case [are] binding on

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In re Stewart Children

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[the court] as to what those orders found to exist when they [are] entered." *In re Wilkerson*, 57 N.C. App. 63, 69, 291 S.E. 2d 182, 186 (1982). The trial court's order must reflect that the termination of parental rights for neglect was based on an independent determination of existing neglect or a determination that conditions exist which will in all probability precipitate a repetition of neglect. *Ballard*, *supra*.

Neither *Ballard* nor *Moore* addressed the specific factual situation presented by this appeal. In those cases the order admitted at the termination proceeding concerned the court's findings of neglect in relation to the DSS's taking custody of the children. In this case we have a previous order, in a termination proceeding, which found that neglect existed which authorized termination, but which also found that termination at that time was not in the best interest of the children. Although factually distinguishable, the rationale for the rule in *Ballard* applies with equal force to this case. It was proper for the district court to admit into evidence the order finding neglect in December of 1983 as evidence that the children were neglected at that time. The court then received evidence on whether the children were still being neglected, at the time of the hearing, in May of 1985.

We also find no merit to respondent's contention that the dismissal of the termination petition in December of 1983 was *res judicata* on the issue of neglect in 1985. The 1983 order dismissed the termination petition in order to give the respondent another chance with her children. It was not dismissed because there was no neglect. To the contrary, the court found neglect; however, it also found it was in the best interest of the children to give the mother another opportunity to parent her children and dismissed the petition for that reason. In order to find that dismissal *res judicata* on the issue of neglect, as respondent urges, we would have to give the district court's order a meaning never intended, *i.e.*, that there was no neglect. We decline to give the order such an interpretation. Thus, we hold that a previous order entered in a termination proceeding is admissible in a subsequent termination proceeding to show neglect as it existed at the time of the entry of the previous order.

[2] The respondent also challenges the sufficiency of the evidence to support the termination order. We find the evidence

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In re Stewart Children

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sufficient to support the order terminating parental rights on the ground of neglect. The trial court's order terminating the respondent's parental rights for neglect was based on both the prior order and on additional evidence adduced at the termination hearing. A child is neglected if he "does not receive proper care, supervision, or discipline from his parent . . . or . . . lives in an environment injurious to his welfare." G.S. 7A-517(21). The findings based on the prior order indicated that the respondent was unable to adequately care for or supervise the children in that the children were not adequately clothed, fed, or bathed. The court found in all three termination orders "[t]hat the respondent Diane Stewart Reid does not have the ability to parent [these children], nor to provide proper care, supervision and discipline for these children *at this time*; and that the prognosis for her to develop the ability to adequately parent these children is very poor." (Emphasis added.) The evidence showed that the respondent's inability to adequately parent her children is due in most part to her mental infirmity and her young age. In January 1983, the respondent was unable to care for and discipline her children as evidenced by the previous order's findings of neglect. The evidence presented at the termination hearing in the present proceeding indicated that in May of 1985, the respondent was still unable to care for or control her children. It is clear that the order terminating the parental rights was based upon the best interests of the children and the fitness of the respondent to care for them at the time of the hearing, in light of all evidence of neglect and the probability of its repetition. We affirm the termination of the respondent's parental rights on grounds of neglect.

A valid finding on one statutorily enumerated ground is sufficient to support an order terminating parental rights. *In re Pierce*, 67 N.C. App. 257, 312 S.E. 2d 900 (1984). Having determined that termination of the respondent's parental rights on grounds of neglect was supported by the trial court's findings, we need not address the respondent's assignments of error challenging the sufficiency of the evidence to terminate, based on other statutory grounds.

Affirmed.

Judges BECTON and PHILLIPS concur.

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**Foster v. Western Electric Co.**

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**BELVA S. FOSTER, EMPLOYEE PLAINTIFF APPELLEE v. WESTERN ELECTRIC CO., EMPLOYER, SELF-INSURED, DEFENDANT APPELLANT**

No. 8510IC1337

(Filed 2 September 1986)

**1. Master and Servant § 69— workers' compensation—no deduction for temporary disability payments**

The Industrial Commission did not err by denying the employer a credit for compensation paid to the employee under a disability and sickness benefits plan separate from workers' compensation. The sickness and disability benefit plan was a fringe benefit payable whether or not the employee's absence was due to a work-related accident and the fact that benefits due under the plan were coordinated with workers' compensation did not bring payments under the plan within the purview of N.C.G.S. § 97-42; moreover, there was no evidence that the payments were made by the employer in that there was no evidence of how the plan was funded.

**2. Master and Servant § 69— workers' compensation—finding that plaintiff could collect company disability benefits and workers' compensation—no prejudicial error**

The evidence did not support a finding by the Industrial Commission that plaintiff could collect under a company benefit plan both company disability benefits and workers' compensation benefits; however, there was no prejudice in light of the ruling on the prior assignment of error.

Judge WEBB dissenting.

APPEAL by defendant from Opinion and Award of the Industrial Commission filed 26 September 1985. Heard in the Court of Appeals 17 April 1986.

Plaintiff was injured on 17 March 1982. She was out of work from 18 March until 10 October 1982. During this time, she was paid \$7,598.16 in weekly installments under an employees' disability benefit plan. On 30 August 1984, the Industrial Commission entered an Opinion and Award for temporary total disability for the same time period, totalling \$6,741.96. Defendants did not appeal that award, but rather made a motion with the Commission that they be allowed a credit against the award of benefits for the payments made under the employees' plan.

An evidentiary hearing was held on 8 November 1984 before Deputy Commissioner Brenda Becton. She concluded that defendant was not entitled to any credit for payments made under the



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Foster v. Western Electric Co.

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employees' plan. Her decision was adopted and affirmed by the Full Commission. Defendant appeals.

*Frye and Kasper by Warren E. Kasper for plaintiff-appellee.*

*Womble, Carlyle, Sandridge and Rice by Richard T. Rice for defendant-appellant.*

PARKER, Judge.

[1] Defendant first argues, based on its assignment of error No. 2, that the Industrial Commission erred in denying the employer a credit for compensation previously paid to the employee during the period of temporary total disability. Defendant employer maintained a disability and sickness benefits plan separate from workers' compensation. The plan provided:

In case any benefit, which the Committee shall determine to be of the same general character as a payment provided by the Plan, shall be payable under any law now in force or hereafter enacted to any employee of the Company, the excess only, if any, of the amount prescribed in the Plan above the amount of such payment prescribed by law shall be payable under the Plan . . . .

Payments made to plaintiff during her disability were paid under this plan since defendant contended plaintiff's injury was not compensable under workers' compensation. Western Electric now argues that G.S. 97-42 permits it to take credit for these payments made under the disability plan against a subsequent award of workers' compensation benefits. G.S. 97-42 reads:

Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Industrial Commission be deducted from the amount to be paid as compensation. Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment.

In *Moretz v. Richards & Associates, Inc.*, 316 N.C. 539, 541, 342 S.E. 2d 844, 846 (1986), our Supreme Court noted with respect to this statute:

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Foster v. Western Electric Co.

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In North Carolina, this section has been held not to apply to fringe benefits or to insurance proceeds that are of a contractual nature rather than proceeds that are grounded in the workers' compensation law. *Ashe v. Barnes*, 255 N.C. 310, 121 S.E. 2d 549 (1961).

The benefit plan under consideration in the instant case is a contractual arrangement between employer and employee incident to employment. A sickness and disability benefit plan is a fringe benefit designed to enhance the attractiveness of initial employment and to encourage loyalty and longevity after an employee is trained. The testimony in this case was that the benefit was payable whether the employee's absence was due to a work-related accident or not. The fact that benefits under the plan were coordinated with workers' compensation does not bring payments under the plan within the purview of G.S. 97-42 as interpreted in *Moretz, supra*.

This interpretation appears to be the general rule in other jurisdictions as well. See 4 Larson, *The Law of Workmen's Compensation* § 97.51(a) (1986). As noted in *Larson*, when confronted with a question of offset or credit for a private contractual plan:

[o]ne cardinal principle . . . should ordinarily settle most such questions. That principle is the simple proposition that the contractual excess is not work[ers'] compensation. It performs the same functions, and is payable under the same general conditions, but legally it is nothing more than the fruit of a private agreement to pay a sum of money on specified conditions.

4 Larson, *supra*, § 97.53. As North Carolina does not have a specific statutory authorization to allow an employer the credit sought here, the Industrial Commission did not err in denying the employer's motion for credit.

Moreover, even if it be assumed *arguendo* that payments under the plan were not contractual in nature, there is no evidence in the record that the payments were made by "the employer" as required by the statute. The record is devoid of any evidence as to how the plan was funded—whether by insurance paid for by the employer, whether by employer contributions or whether by a combination of employer and employee contribu-

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Foster v. Western Electric Co.

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tions. For the foregoing reasons, defendant's second assignment of error is overruled.

[2] Defendant next argues that the Industrial Commission erred in finding that at the time plaintiff began working for defendant, the benefit plan in effect would allow plaintiff to collect both company disability benefits and workers' compensation benefits. Defendant contends that there was no competent evidence in the record to support the finding. We agree. Finding of Fact No. 3, to which defendant has taken proper exception, states:

3. Plaintiff began working for defendant in 1971. *At that time*, defendant had a disability benefits plan for its employees that permitted the defendant's employees benefit committee to *reduce temporary total disability payments* to an employee under the plan by the amount of any payment payable to an employee *under any law*. At the time plaintiff began working for defendant, the benefit plan in effect would allow plaintiff to collect both the company disability benefits and workers' compensation benefits. (Emphasis added.)

Whether there is competent evidence sufficient to support a finding of fact is a question of law reviewable on appeal. *Barham v. Food World, Inc.*, 300 N.C. 329, 266 S.E. 2d 676 (1980). Our review of the record discloses no evidence whatever to support a finding that at the time plaintiff's employment commenced she could collect both company disability benefits and workers' compensation benefits. On the other hand, the testimony and exhibits support the finding that at the time of plaintiff's employment, benefits under the company plan would be reduced by the amount payable under any law. The Workers' Compensation Act is a law; *a fortiori*, plaintiff was not entitled to collect both company benefits and workers' compensation at the time her employment commenced.

However, in view of our disposition of defendant employer's second assignment of error, this finding of fact and exercise of discretion based thereon were not prejudicial.

Defendant's last assignment of error concerning the Commission's denial of its motion for a new hearing is similarly overruled.

The Opinion and Award of the Full Commission is

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Holiday v. Cutchin

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Affirmed.

Judge EAGLES concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. I do not believe *Moretz v. Richards and Associates, Inc.*, 316 N.C. 539, 342 S.E. 2d 844 (1986) mandates the result reached by the majority. That case dealt with a contention by the defendants that they should receive credit on an award for a permanent partial disability for disability payments made before the plaintiff was found to be permanently partially disabled. In this case the disability and sickness benefits plan did not provide "fringe benefits or . . . insurance proceeds that are of a contractual nature. . . ." It contemplated that some of its benefits might overlap with benefits under the Workers' Compensation Act and provided that the plaintiff would not be paid under the plan for anything for which the plaintiff received workers' compensation. I disagree with the majority that the coordination of the plan with workers' compensation does not bring payments under the plan under G.S. 97-42. I believe the plain words of the statute make this section applicable in this case. I vote to reverse the opinion and award of the Industrial Commission.

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RICHARD LEE HOLIDAY v. LAWRENCE M. CUTCHIN, M.D.

No. 853SC728

(Filed 2 September 1986)

**1. Physicians, Surgeons and Allied Professions § 15.1— medical malpractice—failure to allow redirect examination of expert—no prejudice**

There was no prejudice in a medical malpractice action from the court's failure to allow plaintiff's expert to testify on redirect examination that he knew of no circumstances that could have made it unnecessary for defendant to check the pulses in plaintiff's legs where the doctor had made it very plain to the jury that in his opinion it was necessary to check the pulses in a painful leg before ever deciding that the cause was a muscle strain.

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Holiday v. Cutchin

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**2. Physicians, Surgeons and Allied Professions § 14— medical malpractice—instruction on burden of proof—lapsus linguae**

There was no error in a medical malpractice action in which the trial court instructed the jury that plaintiff's burden was beyond the greater weight of the evidence where plaintiff's burden was correctly stated several times and the court acknowledged its one error and correctly reinstructed the jury thereon to plaintiff's probable advantage.

APPEAL by plaintiff from *Tillery, Judge*. Judgment entered 25 January 1985 in Superior Court, PITT County. Heard in the Court of Appeals 4 December 1985.

This medical negligence case, based on the amputation of plaintiff's foot following an injury that defendant diagnosed and treated as muscle strain, has been tried twice and both times the jury returned verdict for defendant. After the first verdict a new trial was ordered by this Court, *Holiday v. Cutchin*, 63 N.C. App. 369, 305 S.E. 2d 45 (1983), and our Supreme Court affirmed, *Holiday v. Cutchin*, 311 N.C. 277, 316 S.E. 2d 55 (1984).

The facts material to plaintiff's claim are essentially undisputed: On 1 April 1979 defendant, a board certified specialist in internal medicine then on rotating duty in the emergency room of the Edgecombe County General Hospital, examined and treated plaintiff, who was brought in crying and complaining of intense pain in his left leg and foot. Plaintiff said that the pain started when he injured his foot two days earlier playing basketball and had increased since then. Defendant's examination revealed that plaintiff's leg had a full range of motion and X-rays indicated that there was no fracture. Defendant diagnosed the injury as a muscle strain and prescribed heat treatment, rest and a pain killer; he did not consider that plaintiff's signs and symptoms could indicate a vascular or circulation problem and he did not check any of the peripheral pulses in either leg. Two days later when plaintiff returned to the emergency room still complaining of pain in the same leg and foot he was examined by Dr. Kelsh, who found that the leg had no pulse and was pale and cold to the touch. Immediately recognizing that blood was not circulating in plaintiff's lower leg and foot Dr. Kelsh had him rushed to Pitt County Memorial Hospital, where a blood clot was removed from one of the arteries in plaintiff's leg. The surgery did not restore the circulation in the foot and lower leg, though, as much of it was

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**Holiday v. Cutchin**

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already dead or dying and an amputation below the knee was done. It is now known that plaintiff had, and has long had, a condition that unduly speeds the clotting of blood known as Anti-Thrombin III deficiency. Until 1981 medical authorities thought that this condition caused clotting only in veins where the blood moves slower and with less force, but since then it has been established that it sometimes, though rarely, causes clotting in arteries also. Because of this condition plaintiff has had recurring circulation problems ever since his first hospitalization. Several different blood clots have been removed from both legs and an additional part of the left leg was amputated, but his right leg is still intact and useable because the clots in it were promptly diagnosed and removed.

During the trial now being reviewed: Three doctors called by the plaintiff testified from hypothetical facts largely as stated above that Dr. Cutchin's failure to check the pulses in plaintiff's painful leg violated the applicable standard of care; if that routine, simple step had been taken defendant would have recognized that plaintiff's difficulty was not a muscle strain but a blocked artery which could have been cleared by removing the clot before the circulation loss seriously affected the foot and leg; the heat treatments defendant prescribed for the painful foot speeded up the destructive process that was started by the blocked artery. Seven doctors called by the defendant testified hypothetically that defendant's examination and treatment of plaintiff was proper in all respects, and he had no reason to suppose that plaintiff's injury was other than a muscle strain.

*Davis & Atkins, by Paul De Vendel Davis, and McLeod & Senter, by Joe McLeod and William L. Senter, for plaintiff appellant.*

*Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James D. Blount, Jr., Nigle B. Barrow, Jr. and Donald H. Tucker, Jr., for defendant appellee.*

PHILLIPS, Judge.

[1] The plaintiff's request for a third trial is based mainly upon the court's refusal to permit his chief expert witness, Dr. Rob, who has been in charge of plaintiff's treatment since Dr. Kelsh sent him to Pitt Memorial Hospital, to testify on redirect exami-

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Holiday v. Cutchin

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nation, in effect, that he knew of no circumstances that could have made it unnecessary for defendant to check the pulses in plaintiff's legs. The central theory of plaintiff's case is that impaired circulation was obviously a possible cause of the intense pain in plaintiff's foot and lower leg when defendant accepted him as a patient; and his failure to check that possibility by simply feeling the pulses in plaintiff's leg was negligence that proximately caused the loss of the leg. Dr. Rob's testimony on direct examination strongly supported all aspects of this theory; but the effect of this testimony was undermined to some extent by defendant eliciting on cross-examination that: Because of plaintiff's Anti-Thrombin III deficiency the blood clot could have developed after defendant examined him and that while the emergency room record stated that plaintiff was injured playing basketball two days earlier, the Pitt Memorial record stated that the injury occurred on the same day plaintiff first went to the emergency room. These elicitations—which tended to show that nature, rather than the negligence of Dr. Cutchin, caused the loss of plaintiff's leg and that one of the premises for Dr. Rob's opinions did not exist—were new matters introduced into evidence, which also tended to devalue Dr. Rob's opinions, and plaintiff had a right to address them on redirect examination. *State v. Cates*, 293 N.C. 462, 238 S.E. 2d 465 (1977); 98 C.J.S. *Witnesses* Sec. 419(c), p. 223 (1957). Plaintiff's proffered response, that no excuse had been or could be offered that would justify defendant's failure to determine whether the blood was circulating in the painful leg, was entirely proper and the court erred in not permitting the testimony. Even so, in our opinion the error was not prejudicial because Dr. Rob had made it very plain to the jury that in his opinion it was necessary to check the pulses in a painful leg before ever deciding that the cause was muscle strain. He so testified several times on direct examination and immediately before and after the two excluded questions he testified to somewhat the same thing. In answering other questions he said, in substance, that changing the sex or age of the patient or the day that he played basketball and was hurt "would have made no difference" so far as checking the pulses in the leg was concerned, as the important thing was that there was "a man sitting there crying and otherwise complaining of pain in his leg." Thus, while the testimony excluded should have been received, in our opinion it would have added nothing material to plaintiff's case. Plaintiff's theory of recovery, founded

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Holiday v. Cutchin

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it would seem as much on common sense as medical knowledge and experience—that when a limb is in pain an attending doctor should check the circulation, a simple, cost free process that can be accomplished by simply touching the patient, which the defendant did in ascertaining that the motions of the limb were not restricted—could not have been any clearer or more persuasive to the jury than it already was. And a jury for the second time not having been persuaded by plaintiff's evidence, clear and plausible though it was, there the matter should rest.

[2] The court also erred in instructing the jury as to plaintiff's burden of proof, as plaintiff maintains, but timely correction was made and plaintiff was not harmed thereby in our opinion. Plaintiff's burden was correctly stated several times but one time it was inadvertently misstated as being "beyond the greater weight of the evidence." After this *lapsus linguae* was called to the court's attention at the end of the charge the court acknowledged the error and correctly reinstructed the jury thereon to plaintiff's probable advantage, if anything. But none of plaintiff's several other assignments, which show neither error nor prejudice, require discussion, as the incidents that they are based upon were remote to and could not have affected the jury's determination that plaintiff was not injured by the negligence of the defendant.

No error.

Judges WHICHARD and JOHNSON concur.



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**Spence v. Spaulding and Perkins, Ltd.**

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WILBERT SPENCE, LINDA SPENCE, GEORGE JONES, PATRICIA JONES, PRESTON HUNTER, PEGGY HUNTER, EDWARD CORBETT, FRANCES CORBETT, CLEVELAND P. SANDERS, ANGELA SANDERS, DAVID M. CHAVIS, BARBARA R. CHAVIS, ROBERT PEACOCK, PHYLLIS PEACOCK, DONALD MASSENBURG, VERTINA MASSENBURG, EDWARD MCKAY, JERRI MCKAY, ROBERT WATKINS, MARY WATKINS, DENNIS SUTTON AND JOYCE SUTTON v. SPAULDING AND PERKINS, LTD., A NORTH CAROLINA CORPORATION; SPAULDING AND PERKINS REALTY COMPANY, A NORTH CAROLINA PARTNERSHIP; GEORGE F. SPAULDING, AND GRADY PERKINS, INDIVIDUALLY

No. 8610SC51

(Filed 2 September 1986)

**1. Brokers and Factors § 4.1— action against real estate brokers—constructive fraud—directed verdict for defendants improper**

The trial court erred by directing a verdict for defendant real estate brokers in an action for constructive fraud where the evidence showed that defendants were plaintiffs' agents in looking for a house; plaintiffs told defendants they wanted to buy a particular house; defendants took title to the house and deeded it to plaintiffs; and defendants did not obtain plaintiffs' informed consent to the purchase of the house by defendants or to defendants' sale to plaintiffs.

**2. Unfair Competition § 1— real estate brokers—constructive fraud—unfair trade practice**

Evidence sufficient to support a claim of constructive fraud against real estate brokers was also sufficient to support an unfair or deceptive trade practice claim where the evidence showed that the practice or act affected commerce. N.C.G.S. § 75.1-1.

APPEAL by plaintiffs Edward and Frances Corbett from *Bailey, Judge*. Judgment entered 23 July 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 10 June 1986.

*Huggard and Hensley, by John P. Huggard, for plaintiff appellants.*

*Thigpen, Blue, Stephens & Fellers, by Carlton E. Fellers, for defendant appellees.*

PHILLIPS, Judge.

The individual defendants are real estate agents and at the time involved herein were doing business in Raleigh through the corporate and partnership defendants. Though the style indicates

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*Spence v. Spaulding and Perkins, Ltd.*

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that this is one case brought by multiple plaintiffs with a common interest or grievance, the "case" is comprised of the unrelated, independent claims of eleven different couples and the only common factor is that all the claims are against the defendants. This appeal concerns only the claims of the plaintiffs Edward M. and Frances G. Corbett for actual and constructive fraud and unfair trade practices in connection with their purchase of a certain house in Raleigh for \$39,900 while defendants were their brokers. The claims were severed for trial and at the end of plaintiffs' evidence a verdict was directed against them on all claims.

Plaintiffs' evidence included their own testimony, that of the two individual defendants and Josephus Ollison, Jr., a co-owner of the property when defendants first showed it to plaintiffs, and the documents hereafter mentioned. Viewed in its light most favorable to the plaintiffs, as the law requires, it is to the following effect: Defendants were the real estate brokers for the plaintiffs, who were looking for a house to buy, and also for Mr. and Mrs. Josephus Ollison, Jr., who owned a house they wanted to sell. While so acting defendants showed plaintiffs the Ollison house listed for sale at \$39,900 and plaintiffs told defendants that they wanted to buy it. Thereafter the defendants ascertained that the Ollisons were willing to sell their house for \$32,500, by receiving \$1,500 in cash and the buyer assuming their \$31,000 mortgage, but instead of communicating that information to plaintiffs defendants bought the house for themselves by paying the Ollisons \$1,500 and assuming the mortgage. Defendants had the deed recorded and thereafter told plaintiffs that the least amount the Ollisons would sell the house for was \$39,900, and that they had better act soon, as another prospect was considering buying it. Plaintiffs were willing to pay \$39,900 for the house, though they would have been glad to get it for less, and they agreed to buy it, not knowing that defendants then were the owners. Defendants prepared an offer to purchase the property from the Ollisons for \$39,900, which plaintiffs signed and defendants accepted on behalf of the Ollisons; defendants also signed the offer as agents for the plaintiffs. At the closing, which the Ollisons did not attend, the settlement statement showed the *Ollisons* as sellers, but the deed that plaintiffs eventually received was from the defendants. The settlement agent at the closing was Raleigh Attorney Carlton E. Fellers, who also searched the title to the property for the plain-

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Spence v. Spaulding and Perkins, Ltd.

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tiffs, drew the deeds signed by the Ollisons and the defendants, and has represented the defendants in this case from the beginning. Both deeds referred to were recorded by Mr. Fellers and both were thereafter mailed to him by the Register of Deeds. How or when plaintiffs received their deed does not appear, but according to their testimony they did not learn that it was from the defendants until several months later when they happened to look at it. When the foregoing evidence is measured against the legal principles that follow, all of which apply to the circumstances presented, it is more than sufficient to support a verdict for plaintiffs on the constructive fraud claim and we vacate the judgment appealed from.

[1] A real estate broker stands in a relation of trust and confidence to his principal. *Starling v. Sproles*, 66 N.C. App. 653, 311 S.E. 2d 688 (1984). In all matters relating to his agency a broker owes his principals an obligation of utmost fidelity and good faith. James A. Webster, *Real Estate Law in North Carolina*, Sec. 131 (1981). His good faith duty includes a legal, ethical and moral responsibility to secure for the principal the best bargain and terms that his skill, judgment and diligence can obtain. *Carver v. Lykes*, 262 N.C. 345, 137 S.E. 2d 139 (1964). A broker has the duty not to conceal from his principals any material information and to make full, open disclosure of all such information. *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971). A broker can neither purchase from nor sell to the principal unless the latter expressly consents thereto with full knowledge of all the facts and circumstances. *Real Estate Licensing Board v. Gallam*, 52 N.C. App. 118, 277 S.E. 2d 853 (1981). "In selling to itself, the defendant attempted to act in the double capacity of agent and purchaser—a combination so incompatible and noxious to the fundamental rule of loyalty demanded of an agent to his principal, acting as a fiduciary, as to be intolerable to public policy." *Anderson Cotton Mills v. Royal Manufacturing Co.*, 221 N.C. 500, 510, 20 S.E. 2d 818, 824 (1942). When property is transferred between a fiduciary and his principal fraud does not have to be established by direct evidence, it is presumed. 2 Brandis N.C. Evidence Sec. 225 (1982). After a *prima facie* case of constructive fraud is made out against a fiduciary by evidence showing a course incompatible with his duty, the fiduciary has the burden of showing that he did not take advantage of his principal and acted throughout in a fair, open

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Spence v. Spaulding and Perkins, Ltd.

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and honest manner. *McNeil v. McNeil*, 223 N.C. 178, 25 S.E. 2d 615 (1943); *Smith v. Moore*, 149 N.C. 185, 62 S.E. 892 (1908).

Though the evidence tending to show that the defendants profited from a reduced price that should have been made available to the plaintiffs adds color to the claim, the foregoing principles of law make plain that plaintiffs' right to a jury trial or even a recovery does not depend upon such proof. Under the circumstances of this case the only proof required to raise a jury issue and put the burden on the defendants to show that they acted openly, honestly and in good faith and took no advantage of plaintiffs is that (1) defendants were plaintiffs' agents in looking for a house to buy; (2) plaintiffs told defendants they wanted to buy the Ollison's house; (3) defendants later took title to the house and deeded it to plaintiffs; and (4) defendants did not obtain plaintiffs' informed consent to defendants' purchase from the Ollisons and defendants' sale to plaintiffs; and the facts stated in (1), (2) and (3) above were stipulated to by defendants in the pre-trial order. Nor, under the circumstances, is it decisive that plaintiffs were willing to pay \$39,900 for the house if they had to; because defendants were obliged to serve plaintiffs with the utmost fidelity and plaintiffs were entitled to obtain any bargain that became available during such service, if they wanted it. *Carver v. Lykes*, *supra*.

[2] The evidence being sufficient to support plaintiffs' constructive fraud claim *a fortiori* it is also sufficient to support the unfair or deceptive trade acts or practices claim, since the evidence shows that the other element of the claim, that the practice or act offered commerce, is present. G.S. 75-1.1; *Wilder v. Squires*, 68 N.C. App. 310, 315 S.E. 2d 63, *disc. rev. denied*, 311 N.C. 769, 321 S.E. 2d 158 (1984). Thus, we vacate the judgment and remand the matter to the Superior Court for a new trial on plaintiffs' claims for constructive fraud and unfair trade practices.

Vacated and remanded.

Judges WHICHARD and MARTIN concur.

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**Beeson v. McDonald**

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BOBBY R. BEESON v. C. WAYNE McDONALD AND WIFE, KAREN C. McDONALD, AND LARRY W. BURNS AND WIFE, JOYCE M. BURNS

No. 8618DC211

(Filed 2 September 1986)

**Vendor and Purchaser § 11— real estate sales contract—addition of conditions—repudiation of contract**

The trial court erred by directing defendants to specifically perform a contract to convey real estate where plaintiff had tendered the agreed purchase price for the deed held in escrow by an attorney but coupled the tender with instructions not to close the transaction until defendants agreed to stated conditions. Plaintiff's actions repudiated the contract and amount to nothing more than a counteroffer to defendants; defendants' duties under the contract were terminated when plaintiff repudiated the contract and made the counteroffer.

APPEAL by defendants from *Hunter, Judge*. Judgment entered 29 October 1985 in District Court, GUILFORD County. Heard in the Court of Appeals 20 August 1986.

This is a civil case wherein plaintiff seeks specific performance of an oral contract to purchase a tract of land from defendants.

After a trial without a jury, the judge made findings and conclusions that, except where quoted, are summarized as follows:

Plaintiff and defendants entered into an oral contract in late August or early September, 1984 whereby plaintiff agreed to purchase and defendants agreed to sell for \$65,000 approximately 19.687 acres located in Guilford County. Located upon that property was a chain-linked fence, a pile of topsoil, and some junk cars used in the operation of an auto salvage yard. Defendants planned to remove these items with their own equipment and "there was no intent by and between" the parties "that the fence, dirt pile, or junk cars be a part of the conveyance."

An attorney, David L. Maynard, prepared the deed conveying the property to plaintiff which defendants executed and left in escrow with the attorney.

On 13 December 1984 plaintiff tendered the full contract price at Maynard's office, along with a written statement containing these conditions:

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**Beeson v. McDonald**

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1. All junk cars must be moved within 30 days unless other arrangements are made within the 30 days.
2. All fences on property will remain.
3. Dirt pile on property will remain.

Plaintiff instructed Maynard "not to close the transaction until the Defendants had agreed to said conditions."

Defendants had intended to perform the original contract but "after being informed of Plaintiff's submission of said written conditions regarding the fence, dirt pile and junk cars located on the property, Defendants refused to proceed with conveyance of the subject property to Plaintiff and instructed Maynard to rescind the parties' contract for the sale of said property."

The trial judge found that plaintiff's actions "constituted an anticipatory breach" but that it "was not a material breach of the parties' oral contract for the sale of real property and therefore Defendants are not entitled to rescind said contract."

Based on the foregoing facts and conclusions the trial court entered judgment as follows:

1. That Defendants are allowed and ordered to remove from the real property referred to above the fence, dirt pile and junk cars contained on said premises, said removal to be within thirty (30) days from entry of this Judgment.
2. That Defendants shall convey to Plaintiff the real property referred to above upon tender by Plaintiff of the Sixty Five Thousand (\$65,000.00) Dollar purchase price therefore.
3. That each party to this action shall bear his own costs.

Defendants appealed.

*Edwards and Stamey, by Michael C. Stamey and Billy G. Edwards, for plaintiff, appellee.*

*Smith, Helms, Mulliss & Moore, by Timothy Peck, for defendants, appellants.*

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**Beeson v. McDonald**

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HEDRICK, Chief Judge.

Defendants contend that the trial court erred in ordering defendants to specifically perform the alleged contract for the sale of their land to plaintiff. Defendants do not challenge the trial judge's declaration that plaintiff anticipatorily breached the contract. They do, however, object to the court's ruling "[t]hat said anticipatory breach by Plaintiff was not a material breach of the parties' oral contract for the sale of real property and therefore Defendants are not entitled to rescind said contract."

We regret the trial judge's use of the label "anticipatory breach" when referring to the conduct or statements of the parties. In most instances "labels" serve only to confuse, not only the parties and attorneys, but judges as well. For that reason we do not copy into our decision any of the numerous definitions and explanations of the label "anticipatory breach." We choose, however, to decide this case by the application of simple principles of contract law, as we understand those principles and apply them to the uncontroverted findings of fact made by the trial judge.

When plaintiff tendered the agreed purchase price to defendants for the deed held in escrow by the attorney and coupled his tender with instructions to defendants that he would not "close the transaction until the Defendants had agreed to said conditions" described in the findings of fact, he, the plaintiff, repudiated the contract. His repudiation was absolute, and amounted to nothing more than a counteroffer to defendants. Defendants did not accept plaintiff's counteroffer but clearly and emphatically rescinded the contract which plaintiff had repudiated. Defendants' duties under the contract were terminated when plaintiff repudiated the contract and made his counteroffer. The trial judge's declaration that the "anticipatory breach . . . was not a material breach of the parties' oral contract" was and is erroneous. An absolute repudiation of a contract can hardly be said to be "not material."

For the reasons set out above the judgment directing defendants to specifically perform the contract must be reversed, and the cause will be remanded to the district court to enter an order concluding as a matter of law from the findings of fact already made that plaintiff by his acts and conduct repudiated the contract, and that defendants justifiably rescinded the contract, and

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**Smith v. Williams**

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the court will enter an order dismissing plaintiff's claim for specific performance with prejudice.

Reversed and remanded.

Judges WEBB and WELLS concur.

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EARL SMITH v. DAVID WILLIAMS, TONY WILLIAMS AND ELMORE JOHNSON

No. 8625DC372

(Filed 2 September 1986)

**Rules of Civil Procedure § 41.1— voluntary dismissal—counterclaim pending—defendant not consenting to dismissal—without prejudice**

An order dismissing a refiled action was vacated where the order granting the voluntary dismissal without the consent of the counterclaiming defendant was based on N.C.G.S. § 1A-1, Rule 41(a)(2), under which the consent of a counterclaiming defendant is not required for a dismissal to be without prejudice.

APPEAL by plaintiff from *Vernon, Judge*. Judgment entered 12 August 1985 in District Court, BURKE County. Heard in the Court of Appeals 29 August 1986.

Plaintiff filed a complaint on or about 26 May 1983 seeking recovery of money allegedly owed him by defendants for goods sold and delivered. Defendants answered, alleging on slightly different facts that they had satisfied the claimed debt.

Defendants also counterclaimed for an overpayment. Plaintiff denied the counterclaim.

The matter was called for trial on 10 December 1984, and the court entered an order on 3 January 1985 which provides in pertinent part:

At 2: o'clock plaintiff was not present with his witness and his attorney was informed that he would be called out and the matter dismissed, whereupon attorney for plaintiff announced in open court that he would take a voluntary dismissal pursuant to G.S. 1A1[,] Rule 41(a)(2).



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Smith v. Williams

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IT IS THEREUPON ORDERED AND ADJUDGED that the order of dismissal be and is hereby entered in this matter without prejudice to the plaintiff.

This 3 day of January 1985.

s/DANIEL R. GREEN, JR.  
Judge Presiding

On 19 April 1985 plaintiff refiled his claim and moved that it be tried separately from defendants' counterclaim, which was still pending. Defendants moved to dismiss on the grounds that plaintiff was not entitled to refile his claim because defendants had not consented to the earlier dismissal and the dismissal was therefore with prejudice, contrary language in the order notwithstanding. Judge Vernon granted the defendants' motion, and plaintiff appealed.

*Wheeler Dale for plaintiff appellant.*

*McMurray & McMurray, by John H. McMurray, for defendant appellees.*

WHICHARD, Judge.

Both parties' arguments proceed on the assumption that the 3 January 1985 voluntary dismissal without prejudice to plaintiff was entered pursuant to G.S. 1A-1, Rule 41(a)(1). The same assumption was apparently made in defendant's motion to dismiss and is also apparently the basis for Judge Vernon's order allowing the motion.

The language of Judge Green's 3 January 1985 order allowing the voluntary dismissal without prejudice clearly indicates, however, that plaintiff sought the dismissal pursuant to G.S. 1A-1, Rule 41(a)(2), and there is no indication that the dismissal was entered under another provision. While it may in fact have been entered under another provision, we are bound by the record on appeal.

G.S. 1A-1, Rule 41(a)(2) allows a plaintiff to request that dismissal be entered "upon order of the judge and upon such terms and conditions as justice requires." Dismissals entered pursuant to this provision are within the discretion of the trial court which may, in the further exercise of its discretion, dismiss with or

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State v. Morgan

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without prejudice. See *King v. Lee*, 279 N.C. 100, 106, 181 S.E. 2d 400, 404 (1978); *Lewis v. Piggott*, 16 N.C. App. 395, 397-98, 192 S.E. 2d 128, 131 (1972). Contrary to the practice under North Carolina Rule 41(a)(1), see *McCarley v. McCarley*, 289 N.C. 109, 111-15, 221 S.E. 2d 490, 493-94 (1976), and contrary to the language and practice under Federal Rule 41(a)(2), see *Moore's Federal Practice* Par. 41.09 (2d ed. 1985), the consent of a counterclaiming defendant is not required for dismissals entered pursuant to North Carolina Rule 41(a)(2) to be without prejudice.

It thus appears that the order dismissing this claim without prejudice was properly entered and that the 12 August 1985 order dismissing plaintiff's refiled action was based on a misunderstanding of the law or of the language of the earlier order. The 12 August 1985 order is accordingly vacated, and the cause is remanded for further proceedings consistent with this opinion.

Vacated and remanded.

Judges WELLS and MARTIN concur.

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STATE OF NORTH CAROLINA v. ERNEST LEE MORGAN

No. 8611SC363

(Filed 2 September 1986)

**1. Criminal Law § 66.16— pretrial photographic identification—no objection or request for voir dire—properly admitted**

There was no error in a prosecution for armed robbery in the admission of a photographic lineup or the admission of a detective's testimony regarding the lineup where the victim identified defendant without objection and where there was no request for a *voir dire* of the witness to probe the basis for the identification. Moreover, the identification procedure was properly conducted and was not impermissibly suggestive.

**2. Criminal Law § 138.28— aggravating factor—prior convictions—properly shown**

The trial court did not err by sentencing defendant to a term in excess of the presumptive based upon a prior conviction where the State offered an F.B.I. fingerprint specialist who testified that the prints on the fingerprint cards of defendant and Carlton Eugene Holley were made by the same individual and then offered evidence that Carlton Eugene Holley had a criminal

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**State v. Morgan**

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record in Virginia. N.C.G.S. § 15A-1340.4(e) is permissive and does not preclude other methods of proof.

APPEAL by defendant from *Clark (Giles R.)*, Judge. Judgment entered 4 November 1985 in Superior Court, LEE County. Heard in the Court of Appeals 25 August 1986.

Defendant was charged in a proper bill of indictment with robbery with a firearm. At trial before Judge Pope the State offered evidence which tended to show the following facts. During the early morning hours of 12 January 1985, Ricky Wicker was working at the Country Cupboard Inc., No. 5 in Sanford, North Carolina. While he was working he was robbed by a "black male with a big gun." This robber was later identified as the defendant. During the course of the robbery, defendant took over \$600.00 from the store. Wicker identified defendant in the courtroom. The courtroom identification was admitted without objection.

The State also offered testimony from Ruth Freeman that on the evening of 11 January 1986 defendant told her that he was going to rob something and that he then left the house in her daughter's car. A Sanford police detective testified that during his investigation he presented Wicker with a photographic lineup. Wicker picked the defendant from this lineup.

The defendant did not offer any evidence on his own behalf. The jury found defendant guilty. Following the verdict, the State requested that prayer for judgment be continued until the next term. Prayer for judgment was continued.

On 4 November 1985, a sentencing hearing was conducted before Judge Clark. At the sentencing hearing the State offered evidence that defendant had a criminal record in the Commonwealth of Virginia under the name Carlton Eugene Holley. At the close of the hearing, the court found as a factor in aggravation that the defendant had a prior conviction of a criminal offense punishable by more than 60 days confinement. No mitigating factors were found. From a judgment sentencing him to a term of thirty-five (35) years imprisonment, defendant appealed.

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State v. Morgan

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*Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas H. Davis, Jr., for the State.*

*F. Jefferson Ward, Jr., for defendant appellant.*

ARNOLD, Judge.

[1] The first issue presented for review is whether the court erred in allowing the State to introduce into evidence State's Exhibit 1, a photographic lineup, and by allowing Detective Gray to answer questions regarding the lineup. By these assignments of error, it appears that defendant is attempting to attack the victim's in-court identification of him by showing that the photographic lineup was impermissibly suggestive. An examination of the record reveals that Wicker identified the defendant as his assailant without any objection by defendant. Furthermore, there was no request for a *voir dire* of the witness to probe into the basis for this identification. By allowing the identification evidence to be admitted without objection, defendant has waived his right to later contest the procedure whereby Wicker identified the defendant. 1 *Brandis on North Carolina Evidence*, § 30 (1982). Nevertheless, we have reviewed the identification procedure and find that it was properly conducted and was not impermissibly suggestive.

[2] Defendant also contends the court erred by allowing the State to offer evidence at his sentencing hearing that the defendant had a criminal record in another jurisdiction under an alias, Carlton Eugene Holley. At the sentencing hearing the State offered evidence from an expert witness, an F.B.I. fingerprint specialist, that defendant's fingerprints matched the fingerprints of Carlton Eugene Holley. In fact the expert testified that the prints on the fingerprint cards of Morgan and Holley were "made by one and the same individual." The State then offered evidence that Carlton Eugene Holley had a criminal record in the Commonwealth of Virginia. The records showed that defendant had been convicted of criminal offenses punishable by more than 60 days confinement.

G.S. 15A-1340.4(e) provides:

A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record

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*State v. Morgan*

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of a prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein. No prior conviction which occurred while the defendant was indigent may be considered in sentencing unless the defendant was represented by counsel or waived counsel with respect to that prior conviction. A defendant may make a motion to suppress evidence of a prior conviction pursuant to G.S. 15A-980. If the motion is made for the first time during the sentencing stage of the criminal action, either the State or the defendant is entitled to a continuance of the sentencing hearing.

This language regarding the means of proving a prior conviction is permissive. The statute does not preclude other methods of proof. *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983).

We hold that the method used by the State in this matter was appropriate. Thus, we find the court did not err in sentencing defendant to a term in excess of the presumptive term based upon a prior conviction.

No error.

Chief Judge HEDRICK and Judge WEBB concur.

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**State v. Siegfried Corp.**

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STATE OF NORTH CAROLINA, ON RELATION OF PETER GILCHRIST, DISTRICT ATTORNEY FOR THE 26TH JUDICIAL DISTRICT v. SIEGFRIED CORPORATION, A NORTH CAROLINA CORPORATION D/B/A DAVID'S (A/K/A CHAPS), ALSO DAVID'S - 1054 CHARLOTTE, INC. D/B/A DAVID'S ADULT BOOK STORE (A/K/A CHAPS), RONNIE LAMAR CHASTAIN, CLIFTON B. VANN, SOUTHERN ELECTRONICS CORPORATION, A NORTH CAROLINA CORPORATION

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STATE OF NORTH CAROLINA, ON RELATION OF PETER GILCHRIST, DISTRICT ATTORNEY FOR THE 26TH JUDICIAL DISTRICT v. EIGHTY NINE FORTY ONE EAST INDEPENDENCE, INC., A SOUTH CAROLINA CORPORATION, D/B/A EAST INDEPENDENCE BOOK STORE, ROSALIND FOWLER CAMPBELL, JAMES BARNES HATHAWAY, AND RICHARD TIMOTHY ALLEN, ROGER GRIGGS, AND STEVE WINNICK

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STATE OF NORTH CAROLINA, ON RELATION OF PETER GILCHRIST, DISTRICT ATTORNEY FOR THE 26TH JUDICIAL DISTRICT v. 6101 WILKINSON BOULEVARD, INC., D/B/A AIRPORT NEWS AND TOBACCO, JAMES B. HATHAWAY, ROGER GRIGGS, STEVE WINNICK, EDOUARD STOCKLI, URS STAEHLI, LAURIE INDUSTRIES COMPANY, NEW YORK CORPORATIONS

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STATE OF NORTH CAROLINA, ON RELATION OF PETER GILCHRIST, DISTRICT ATTORNEY FOR THE 26TH JUDICIAL DISTRICT v. CINEMA BLUE OF CHARLOTTE, INC., A NORTH CAROLINA CORPORATION D/B/A CINEMA BLUE THEATRE, DAVID M. SCHOCK, THOMAS MICHAEL, AND JAMIE T. HERRIN

No. 8626SC138

(Filed 2 September 1986)

**Appeal and Error § 6.2— appeal from interlocutory orders—dismissed**

An appeal from orders requiring defendants to produce documents and things requested by plaintiff, denying defendants' motions to suppress evidence, and denying defendants' motions to dismiss for lack of a prior adversary hearing was dismissed as being from interlocutory orders not affecting substantial rights.

APPEAL by defendants 1054 Charlotte, Inc.; Eighty-Nine Forty-One East Independence, Inc.; 6101 Wilkinson Boulevard, Inc.; Cinema Blue of Charlotte, Inc.; Steve Winick; Roger Griggs; David Schoch and James Barnes Hathaway from *Gaines, Judge*. Orders entered 30 September 1985 and 3 October 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 August 1986.

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State v. Siegfried Corp.

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*Robert F. Thomas, Jr., Paul L. Whitfield, and J. Baron Groshom for plaintiff, appellee.*

*Gillespie & Lesesne, by Louis L. Lesesne, Jr., and Arthur M. Schwartz, P.C., by Arthur M. Schwartz and Bradley J. Reich, for defendants, appellants 1054 Charlotte, Inc.; Eighty-Nine Forty-One East Independence, Inc.; 6101 Wilkinson Boulevard, Inc.; Cinema Blue of Charlotte, Inc.; and Steve Winick.*

*Ferguson, Stein, Watt, Wallas & Adkins, P.A., by John W. Gresham, for defendants, appellants Roger Griggs, David Schoch and James Barnes Hathaway.*

HEDRICK, Chief Judge.

Defendants have appealed from the following interlocutory orders: 1) Orders entered 30 September 1985 ordering defendants 1054 Charlotte, Inc.; Eighty-Nine Forty-One East Independence, Inc.; 6101 Wilkinson Boulevard, Inc.; and Cinema Blue of Charlotte, Inc. to produce documents and things requested by plaintiff; 2) orders entered 3 October 1985 denying all defendants' motions to suppress evidence; and 3) orders entered 3 October 1985 denying all defendants' motions to dismiss for lack of a prior adversary hearing. The record on appeal was filed in this Court on 3 February 1986. After briefs were filed, plaintiff, appellee made a motion to dismiss the appeal on the grounds that no appeal lies from these interlocutory orders. Ruling on the motion to dismiss was referred to the panel to which the case is assigned.

The case was assigned to this panel and calendared for hearing on the date listed above. This appeal is dismissed as being from interlocutory orders not affecting a substantial right.

Appeal dismissed; writ of supersedeas and temporary stay dissolved, and the cause is remanded to the superior court for further proceedings.

Judges WEBB and WELLS concur.

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**Sanders v. Spaulding and Perkins, Ltd.**

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CLEVELAND P. SANDERS AND ANGELA SANDERS v. SPAULDING AND PERKINS, LTD., A NORTH CAROLINA CORPORATION; SPAULDING AND PERKINS REALTY COMPANY, A NORTH CAROLINA PARTNERSHIP; GEORGE F. SPAULDING AND GRADY PERKINS, INDIVIDUALLY

No. 8610SC155

(Filed 2 September 1986)

**1. Fraud § 7— real estate sale—constructive fraud—evidence sufficient**

There was sufficient evidence of constructive fraud in a transaction with a real estate agent where defendants either admitted or stipulated that the two property sales occurred; that they were plaintiffs' agents in regard to them; that a relationship of trust and confidence existed between them; that defendants concealed from plaintiffs that the house defendants "found" for plaintiffs to buy was owned by them; and defendants failed to fully account for the equity proceeds from the sale of plaintiffs' house.

**2. Fraud § 13— real estate transaction—damages**

The trial court did not err in an action for fraud against licensed real estate agents by submitting punitive damages to the jury and did not abuse its discretion by denying defendants' motion for a new trial on the grounds of excessive damages.

APPEAL by defendants from *Hight, Judge*. Judgment entered 29 August 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 11 June 1986.

*Huggard and Hensley, by John P. Huggard, for plaintiff appellees.*

*Thigpen, Blue, Stephens & Fellers, by Carlton E. Fellers, for defendant appellants.*

PHILLIPS, Judge.

The individual defendants are licensed real estate agents and at the times involved herein conducted their business through the corporate and partnership defendants. Plaintiffs sued defendants for fraud in two transactions in which they served as agents or brokers for plaintiffs; in one transaction a house that plaintiffs owned was sold and in the other plaintiffs bought a house that defendants found for them, which they later learned belonged to the defendants. At trial the jury found that a fiduciary relationship existed between plaintiffs and defendants, that defendants did not handle the two transactions in a fair, honest and open



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Sanders v. Spaulding and Perkins, Ltd.

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manner, and awarded plaintiffs \$4,000 in compensatory damages and \$1,000 in punitive damages. In appealing from the judgment entered on the verdict defendants bring forward four assignments of error; none has merit and we overrule them.

[1] Two of defendants' assignments, the first and third, make the same contention—that no evidence of their alleged fraud was presented—and should have resulted in one question being stated and one argument being made, rather than two. In any event, apart from evidence presented to the same effect, defendants either admitted or stipulated that the two property sales occurred, that they were plaintiffs' agents in regard to them, and that a "relationship of trust and confidence" existed between them—which is clearly enough to make out a *prima facie* case of constructive fraud, since under our law when property is transferred between a fiduciary and his principal fraud is presumed. 2 Brandis N.C. Evidence Sec. 225 (1982). Thus, instead of plaintiffs being required to go further and present direct evidence of defendants' fraud, defendants had the burden of showing that they did not take advantage of plaintiffs and had handled the transactions in a fair, open and honest manner. *McNeil v. McNeil*, 223 N.C. 178, 25 S.E. 2d 615 (1943); *Smith v. Moore*, 149 N.C. 185, 62 S.E. 892 (1908). But plaintiffs had more in their favor than a presumption based on the relationship between the parties; evidence was presented tending to show that defendants concealed from plaintiffs, contrary to their fiduciary duty of full, open disclosure, *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971), that the house defendants "found" for plaintiffs to buy was owned by them, and that defendants failed to fully account for the equity proceeds they received from the sale of the plaintiffs' house. That defendants' evidence tended to show that defendants had good motives and acted in an open and honest manner in the two transactions is irrelevant to the question presented, as the jury found otherwise.

[2] By their second assignment defendants contend that it was error to submit the punitive damages issue to the jury, but our law authorizes punitive damages when a defendant's fraud has been established. *Newton v. The Standard Fire Insurance Company*, 291 N.C. 105, 229 S.E. 2d 297 (1976). Defendants finally cite as error the denial of their motion for a new trial on the grounds that the damages awarded were excessive. This motion, made pursuant to the provisions of Rule 59(a)(6) of the N.C. Rules of

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State v. Thomas

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Civil Procedure, was addressed to the court's discretion, *Worthington v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982), and the record contains no indication of abuse.

No error.

Judges WHICHARD and MARTIN concur.

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STATE OF NORTH CAROLINA v. JOHNNY THOMAS, JR., AKA JOHNNY THOMAS TAYLOR AKA THOMAS TAYLOR AKA JOHNNY COX AKA JOHNNY THOMPSON AKA SAMUEL COBB AKA WILLIAM DAVIS AKA NATHANIEL CLARK AKA THOMAS COX AKA JOHN THOMAS DARDEN AKA THOMAS DARDEN

No. 868SC337

(Filed 2 September 1986)

**Criminal Law § 141 — habitual felon — treated as substantive offense — new hearing**

Defendant was entitled to a new sentencing hearing where the trial court treated a violation of the Habitual Felon Act as a separate substantive offense rather than as a punishment enhancer. N.C.G.S. § 14-7.6.

APPEAL by defendant from *Lewis, Jr., Judge*. Judgments entered 15 November 1985 in Superior Court, LENOIR County. Heard in the Court of Appeals 29 August 1986.

On 3 September 1985 defendant was indicted on charges of breaking and entering, larceny pursuant to a breaking and entering, receiving stolen goods and possessing stolen goods. Defendant was also charged in a separate bill of indictment as an habitual felon in violation of G.S. 14-7.1. The jury found defendant guilty of felonious breaking and entering, felonious larceny, and "being an habitual felon."

The court sentenced defendant to a term of seven years upon his conviction of felonious breaking and entering and felonious larceny, and in a separate judgment and commitment sentenced him to a fourteen year consecutive sentence for the offense of being an "Habitual Felon." Defendant appealed.

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State v. Thomas

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*Attorney General Thornburg, by Associate Attorney General James A. Wellons, for the State.*

*Paul Jones for defendant appellant.*

WHICHARD, Judge.

We have carefully considered defendant's first, second, and fourth assignments of error. We find no prejudicial error in any of them and accordingly overrule them.

In his third assignment of error defendant contends the court erred in sentencing him in a separate judgment and commitment as an habitual felon in violation of G.S. 14-7.1 because being an habitual felon is not a substantive crime. We agree.

In *State v. Allen*, 292 N.C. 431, 435, 233 S.E. 2d 585, 588 (1977), our Supreme Court stated:

The only reason for establishing that an accused is an habitual felon is to enhance the punishment which would otherwise be appropriate for the substantive felony which he has allegedly committed while in such a status. The effect of such a proceeding "is to enhance the punishment of those found guilty of crime who are also shown to have been convicted of other crimes in the past." *Spencer v. Texas, supra*, 385 U.S. at 556. Being an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence. "The habitual criminal act . . . does not create a new and separate criminal offense for which a person may be separately sentenced but provides merely that the repetition of criminal conduct aggravates the guilt and justifies greater punishment than ordinarily would be considered." *State v. Tyndall*, 187 Neb. 48, 50, 187 N.W. 2d 298, 300, *cert. denied sub nom. Goham v. Nebraska*, 404 U.S. 1004 (1971).

Further, as this Court stated in *State v. Aldridge*, 67 N.C. App. 655, 659, 314 S.E. 2d 139, 143 (1984): "Upon a conviction as an habitual felon, the court must sentence the defendant for the underlying felony as a Class C felon."

Because the trial court erred in treating the violation of the Habitual Felon Act as a separate substantive offense rather than

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**Dillingham v. Yeargin Construction Co.**

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as a punishment enhancer as required by *State v. Allen, supra*, defendant is entitled to a new sentencing hearing. At the new sentencing hearing each of the two underlying felonies herein should be treated as a Class C felony. G.S. 14-7.6.

The judgment in 85CRS7789 finding defendant guilty of being an habitual felon is vacated. The judgment finding defendant guilty of breaking or entering and larceny, 85CRS5711, is remanded for resentencing in accordance with this opinion.

In 85CRS7789, judgment vacated.

In 85CRS5711, remanded for resentencing.

Judges WELLS and MARTIN concur.

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CARLOS L. DILLINGHAM, EMPLOYEE-PLAINTIFF v. YEARGIN CONSTRUCTION COMPANY, EMPLOYER, AND AETNA CASUALTY AND SURETY CO., CARRIER, DEFENDANTS

No. 8610IC287

(Filed 16 September 1986)

**Master and Servant §§ 55.1, 67— workers' compensation—heart attack—no injury by accident**

Evidence was sufficient to support the finding of the Industrial Commission that plaintiff's heart attack was not an injury by accident arising out of and in the course of his employment where it tended to show that plaintiff was attending to his usual and customary duties as an instrumentation fitter at a nuclear power plant when he suffered a heart attack; plaintiff was not subjected to any unusual exertion or strain at the time; the temperature inside the room where he was working was cooler than the outside temperature; and plaintiff was not at an increased risk of developing heat exhaustion or cardiac arrest than the general public.

APPEAL by employee-plaintiff from the Opinion and Award of the North Carolina Industrial Commission entered 10 January 1986, which affirmed the Opinion and Award of Winston L. Page, Jr., Deputy Commissioner, entered 4 September 1985. Heard in the Court of Appeals 27 August 1986.

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**Dillingham v. Yeargin Construction Co.**

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This is a workers' compensation case in which the plaintiff was denied benefits for cardiac arrest suffered while on the job.

On 20 June 1984, the fifty-seven year old plaintiff had been employed for two months by the defendant, Yeargin Construction Company, as an instrumentation fitter at the Carolina Power and Light Company Brunswick Nuclear Electric Generating Plant. Some of plaintiff's duties required him to enter the reactor building while it was in operation. The attendant danger of radiation required him to wear protective clothing, which included a special protective suit, two pairs of plastic boots, rubber boots, heavy coveralls, cotton gloves, surgical gloves, and a hood covering his head. All seams and gaps around the neck, wrists, and ankles were sealed with duct tape. The plaintiff had worn the radiation suit approximately ten times during the two months he had been employed by the defendant and had worked in various hot areas of the plant, including the HPIC room and the drywell area. Each time the plaintiff would be perspiring heavily by the time he was completely dressed in the suit and prior to entering any work areas.

On the day of his injury, the plaintiff was assigned to work with Robert Harrelson in the HPIC room, a large area directly beneath the reactor. After dressing in radiation suits, the two men entered the work area. The outside temperature was estimated at 90 degrees and the temperature in the HPIC room was at least 86 degrees. Due to the cramped conditions in the room, only one person could work on the assigned valve.

Approximately thirty minutes after entering the room and working on the valve, the plaintiff stood up and struck his head on a pipe. He then began experiencing chills, dizziness, and weakness. Plaintiff told Harrelson that he needed to leave the room. After plaintiff removed his protective clothing, his foreman escorted him to the plant's first aid area. There, he passed out and was administered cardio-pulmonary resuscitation (CPR).

Plaintiff was transferred to Doshier Hospital in Southport and then to New Hanover Hospital in Wilmington, where he was treated for ventricular fibrillation. Dr. William F. Credle, Jr., who initially treated the plaintiff, diagnosed the plaintiff as having suffered a cardiac arrest precipitated by "exhaustive" heat conditions in plaintiff's work area. The diagnosis was based in part on

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**Dillingham v. Yeargin Construction Co.**

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a history given largely by the plaintiff himself. That diagnosis was corroborated by Dr. William V. Grossman, whose tests revealed no underlying coronary heart disease. Dr. Grossman had treated the plaintiff on 16 July 1984, when the plaintiff suffered problems at home after his discharge from the hospital on 3 July 1984.

Deputy Commissioner Page, in his Opinion and Award, determined that the plaintiff had sustained an injury in the course of his employment, but that the injury did not occur as the result of an accident. The Deputy Commissioner found that the injury occurred during plaintiff's normal work routine, that he was not exposed to extreme heat, and that he was not at greater risk of developing heat exhaustion or cardiac arrest than the general public not so employed. Deputy Commissioner Page concluded, therefore, that the plaintiff had not suffered an injury by accident arising out of and in the course of his employment and denied plaintiff's claim for compensation. Plaintiff appealed to the full Commission, which affirmed the Deputy Commissioner.

*Murchison, Taylor, and Shell, by Michael Murchison and Vaiden P. Kendrick, for the plaintiff-appellant.*

*Marshall, Williams, Gorham, and Brawley, by Ronald H. Woodruff, for defendant-appellee.*

EAGLES, Judge.

The plaintiff assigns as error the finding of the Industrial Commission that his heart attack was not an injury by accident arising out of and in the course of his employment. Since it is undisputed that the heart attack arose out of and in the course of plaintiff's employment, our inquiry is limited to deciding whether the Commission erred in finding that it was not caused by an accident. In reviewing the Commission's findings, we are limited in that we may consider only (1) whether there is competent evidence to support the Commission's findings and (2) whether those findings justify the Commission's legal conclusions. *Barham v. Food World*, 300 N.C. 329, 266 S.E. 2d 676, *reh. denied*, 300 N.C. 562, 270 S.E. 2d 105 (1980).

In order for an injury to be compensable under G.S. 97.2(6), it must result from an accident to be compensable. The term "acci-

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Dillingham v. Yeargin Construction Co.

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dent" has been variously defined, but, in essence, it requires that the injury be the result of some unusual or unexpected event or condition. See *Gabriel v. Newton*, 227 N.C. 314, 42 S.E. 2d 96 (1947). Where the injury is caused by a heart attack, the plaintiff must show that it was precipitated by some "unusual or extraordinary exertion." *Lewter v. Enterprises, Inc.*, 240 N.C. 399, 404, 82 S.E. 2d 410, 415 (1954).

In addition, it is well established that where the injury occurs while the plaintiff is carrying on his usual and customary duties in his usual way, the injury does not arise by accident. *Jackson v. North Carolina State Hwy. Comm'n*, 272 N.C. 697, 158 S.E. 2d 865 (1968); *Sanderson v. Northeast Const. Co.*, 77 N.C. App. 117, 334 S.E. 2d 392 (1985). This is true even where the exertion is the obvious cause of the injury. See *Slade v. Hosiery Mills*, 209 N.C. 823, 184 S.E. 844 (1936); *Neely v. Statesville*, 212 N.C. 365, 193 S.E. 664 (1937); *Jackson, supra*. In order for plaintiff appellant to prevail here, he must demonstrate that the evidence required the Commission to find that the heat and other conditions plaintiff was subject to were such that it could not be said that he was carrying on his usual work in his usual way when the heart attack occurred.

In its "Findings of Fact," the Commission found, in part, that:

7. . . . Plaintiff's injury did not however occur as the result of any interruption of his normal work routine. Plaintiff was not exposed to extreme heat nor did his injury result from extreme exertion. The temperature in the work area was cooler than the surrounding outside air and the area was ventilated with conditioned air.

8. Plaintiff was not at an increased risk of developing heat exhaustion or cardiac arrest as a result of his work in the HPIC area, than the general public not so employed.

Plaintiff argues that these findings are erroneous. Specifically, the plaintiff contends that the conditions to which he was exposed on 20 June 1984 were sufficiently unusual and unexpected to constitute an accident. Based on our examination of the record, we hold that there was competent evidence to support the Commission's findings of fact and that the Commission's findings support its legal conclusion that the plaintiff did not suffer an injury by accident.

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**Dillingham v. Yeargin Construction Co.**

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The evidence shows that the plaintiff was attending to his usual and customary duties when his heart attack occurred. The plaintiff was an instrumentation fitter, hired to work at the Brunswick nuclear power plant. Accordingly, he was sometimes required to work in areas where there was a risk of exposure to radiation. By his own estimate, plaintiff had done this type of work approximately 10 times in the two months he had been employed at the plant. Each time, it was necessary for him to dress in the special protective clothing. Although plaintiff makes much of the fact that he spent about 75% of his working time outside of the plant, the amount of time spent pursuing a particular task does not answer the crucial question of whether a task was, nevertheless, part of his usual work. Here, all of the evidence indicates that working in the HPIC room was an integral part of plaintiff's usual work responsibilities.

There is also competent evidence to support the Commission's findings that the temperature was not unusually hot and that the plaintiff was not exposed to a greater risk from the heat than the general public. The plaintiff testified that the HPIC room was "at least" 20 degrees hotter than the outside temperature, which he estimated at over 90 degrees. He also testified, however, that he would rather get an answer on what the temperature was inside the HPIC room from someone else. In addition, the plaintiff had earlier testified that there was no way he could guess at the inside temperature and that "[i]t was just hot, that's all I can say." He also testified that the HPIC room was the hottest area of the plant.

Plaintiff also attempted to demonstrate that he was subject to an unusual amount of heat by testifying that he was sweating profusely inside the radiation suit. No evidence was presented, however, to show how much hotter it was inside the suit, to what degree this additional temperature could have increased his risk of cardiac arrest, or whether that temperature might be considered unusual. Moreover, the plaintiff testified that he sweated each time he had worn the suit and that the sweating had begun in the dressing area and before he had even begun working in the HPIC room.

The Commission also heard evidence on the temperature of the HPIC room from Robert Harrelson, who was the only other



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Dillingham v. Yeargin Construction Co.

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person in the room at the time. Mr. Harrelson testified that the HPIC room was hot but not abnormally hot. He also testified that the HPIC room was no warmer than other parts of the plant and that it had an air conditioning vent. When asked to compare the outside temperature with the inside temperature he said that they were "maybe the same" but that he did not know. The only other evidence of the temperature in the HPIC room came from Dr. Credle. Dr. Credle stated in his deposition that part of the history he received concerning the plaintiff's injury was a statement by the plant's safety officer that the temperature in the HPIC room was "in excess of 86 degrees."

The evidence of the temperature of the outside air, the HPIC room, and inside the radiation suit is scant and inconclusive. Because findings of the Commission are conclusive on appeal if supported by competent evidence, even when the evidence supports a contrary finding, *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981), we may not reverse the Commission's findings that the temperature in the HPIC room was cooler than the outside temperature, that the plaintiff was not exposed to extreme heat, and that the plaintiff was not at a greater risk of cardiac arrest than the general public.

We note that the Commission's findings of fact contain a finding that the plaintiff did not suffer from "extreme" heat or "extreme" exertion. Since, however, a plaintiff needs to show that the exertion or strain was only unusual, not extreme, this finding would, by itself, be insufficient for us to determine the rights of the parties. Consequently, we would have to remand this case for further findings of fact. *Perry v. Hibriten Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978).

Taking its findings as a whole, however, it is apparent that the Commission found that the plaintiff suffered no unusual, as well as no extreme, exertion or strain. The Commission's findings that the injury did not occur as the result of any interruption of plaintiff's work routine, that the temperature outside was hotter than it was inside, and that the plaintiff was not at an increased risk of developing heat exhaustion or cardiac arrest than the general public, all clearly indicate that it found that the exertion and strain which the plaintiff was working under on 20 June 1984 was not unusual.

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**Dillingham v. Yeargin Construction Co.**

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The plaintiff relies on *Fields v. Plumbing Co.*, 224 N.C. 841, 32 S.E. 2d 623 (1945) in support of his argument that his heart attack was an injury by accident. In *Fields*, the court affirmed the Commission's award to a plumber who died from heat exhaustion. The plumber was working in an unfinished building, caulking pipes with hot lead. The temperature that day reached 104 degrees and he had been working all day, often with his head close to the hot lead. In affirming the award, the court said that the test for recovery was "whether the employment subjects the workman to a greater hazard or risk than that to which he otherwise would be exposed." *Id.* at 843, 32 S.E. 2d at 624. Plaintiff contends that the test enunciated in *Fields*, and the facts in this case, require us to reverse the Commission's denial of his award. We disagree.

The *Fields* decision is readily distinguishable. There, the temperature was 104 degrees and the plumber had worked all day. In addition, the evidence showed that the natural heat of the day was increased by the hot molten lead with which the plumber was working. No similar conditions existed in the instant case. The outside temperature was estimated at 90 degrees and the Commission found that the temperature in the HPIC room was even lower. The evidence shows that wearing the radiation suit would make one hot. But, other than the plaintiff's testimony that he was sweating just after putting it on, there is no evidence which shows how much hotter it made the temperature. In addition, the plaintiff had worked only about 30 minutes when he suffered his heart attack.

Most importantly, *Fields* does not mandate a reversal of the Commission because of the nature of the court's holding there. In *Fields*, the Commission had found that the additional hazard created by the heat from the lead directly caused the plaintiff's death. The court merely held that there was sufficient evidence to support that finding, noting that the evidence was slight and permitted a contrary conclusion. What the court did in *Fields* is, therefore, no different than what we must do here: affirm findings of the Commission because they are supported by competent evidence.

The facts in the cases of *Slade v. Hosiery Mills*, *supra*, and *Neely v. Statesville*, *supra*, are more analogous than the *Fields*

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Dillingham v. Yeargin Construction Co.

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decision. In *Slade*, the employee's job required him to wash heavy machinery and to remove ashes from the furnaces. The employee was working in a hot room on an unusually hot day in June. He got wet and, when he went outside into the open air, the sudden change in temperature caused him to contract pneumonia, from which he later died. Because there was no evidence that the conditions were unusual, the court reversed the Commission's award. The employee, the court said, "was pursuing the general routine of his employment. Nothing unusual or unexpected took place at the mill. The weather was hot, but not excessively so." *Id.* at 826, 184 S.E. at 845.

In *Neely*, the court reversed an award given to a fireman who suffered a heart attack while fighting a fire. The fireman had to pull 700 feet of heavy firehose from a fire truck, rush up two flights of stairs and up into the attic of a burning house. The court held that, even though the heat and smoke were almost unbearable, the fireman was carrying on his usual work and the surrounding conditions which precipitated the attack were to be expected. Therefore, his injury was not one by accident.

We believe that *Slade* and *Neely* are controlling and require us to affirm the Commission's denial of the plaintiff's claim. Competent evidence shows that working in the HPIC room under unpleasantly hot and cramped conditions was part of the plaintiff's usual employment duties. Competent evidence also shows that the manner and method by which he performed his duties that day were not unusual or extraordinary. Therefore, the Commission could have properly reached the legal conclusion that the plaintiff did not suffer an injury by accident arising out of and in the course of his employment.

The denial of plaintiff's claim by the Industrial Commission is therefore affirmed.

Affirmed.

Judges ARNOLD and PARKER concur.

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**Estee Co. v. Goodman**

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**ESTEEL COMPANY v. B. PAUL GOODMAN**

No. 8628SC182

(Filed 16 September 1986)

**1. Rules of Civil Procedure § 41— motion for involuntary dismissal—discretionary power of trial court**

In an action to recover for conversion of a crane, the trial court did not err in refusing to grant defendant's motion for involuntary dismissal at the close of plaintiff's evidence, since N.C.G.S. § 1A-1, Rule 41(b) clearly allows the court to decline to render judgment until all of the evidence has been presented.

**2. Vendor and Purchaser § 1.4— option to purchase crane—payment required to exercise option—no payment—option not exercised**

In an action to recover for conversion of a crane where defendant alleged that he exercised an option to purchase the crane and there was therefore no conversion, the trial court properly concluded that the option was never exercised where there was evidence that defendant's company intended to exercise the option and evidence to the contrary; the option clause itself was ambiguous as to whether both notification *and* payment were necessary to exercise the option; the trial court properly construed the agreement strictly in favor of the optionor and non-drafting party, plaintiff; and the uncontradicted evidence showed that payment was never made and the option was therefore never exercised.

**3. Corporations § 15— conversion of crane—liability of corporation's president**

Defendant could be held personally liable for the conversion of a crane leased by his company since an officer of a corporation who commits a tort is individually liable for that tort, even though the officer may have acted on behalf of the corporation in committing the wrongful act; defendant's company sold the leased crane to another company; the certificate guaranteeing the quality of the crane, which accompanied the sale of the crane, was signed by defendant in his representative capacity; and defendant admitted his participation in the sale.

**4. Trover and Conversion § 4— conversion of crane—fair market value—sufficiency of evidence**

In an action to recover for conversion of a crane, evidence was sufficient to support the trial court's determination of the fair market value of the crane at the time of conversion where such evidence consisted of the amount plaintiff had paid for the machinery, the sale price contained in the agreement between plaintiff and defendant's company two years before the alleged conversion, the cost of repairs and maintenance performed on the machine while in the possession of defendant's company, and defendant's certification to a subsequent purchaser that the machine was in excellent condition.

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Esteel Co. v. Goodman

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APPEAL by defendant from *Ferrell, Judge*. Judgment entered 2 April 1985 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 19 August 1986.

On 22 October 1979, the Esteel Company (Esteel), a Tennessee partnership, and Al J. Goodman & Sons, Inc. (Goodman & Sons), a North Carolina corporation, entered into an equipment rental agreement pursuant to which Esteel leased to Goodman & Sons a Pettibone Model 36 truck crane for a minimum period of six months at a monthly rental rate of \$1,500, commencing on 6 November 1979. The agreement also provided that Goodman & Sons would have an option to purchase the crane at a price of \$35,000, and that if Goodman & Sons exercised the option, all of the rent paid during the first six months, and two-thirds of any rental paid thereafter, would be credited against the purchase price. The balance of the purchase price was made "payable within 30 days of notification by lessee to lessor of election to purchase machine." Title to the crane was to remain in Esteel unless transferred to Goodman & Sons through sale. The lease was signed for Goodman & Sons by B. Paul Goodman, the defendant in this action, who signed in his representative capacity as president.

During the first 12 months of the lease, all monthly rents were paid, totaling \$19,500. Sometime after, a dispute arose as to payments for repairs that Goodman & Sons had to perform on the truck. Following a letter from Goodman & Sons to Esteel, dated 27 April 1981, the two agreed to divide the costs of the repairs evenly. This letter also discussed treatment of rent due from 6 November 1980 to that time, as well as the amount of rent paid that could be credited towards the machine's purchase.

On 24 July 1981, a check for \$10,312.22 from Goodman & Sons was sent to Esteel; this amount equaled the rents due for 6 November 1980—6 August 1981, less Esteel's share of the repair costs. An accompanying purchase order showed a balance remaining of \$11,000 owed to Esteel, which equaled the amount which Goodman & Sons would owe Esteel for the crane if Goodman & Sons had exercised its option. No payments from Goodman & Sons were received after that time.

On 9 October 1981, Goodman & Sons sold the crane to Productos Metalicos Especialzados, a Mexican company, for

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**Esteel Co. v. Goodman**

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\$53,011.68. The certificate accompanying the sale was signed by defendant B. Paul Goodman as president of Goodman & Sons. Esteel was not informed of the sale until approximately one month later.

After learning of the crane's sale, Esteel sent Goodman & Sons a letter, dated 11 November 1981, informing it that the lease was being terminated due to default and demanding return of the crane. Defendant B. Paul Goodman denied receiving this letter. By another letter dated 10 February 1982, Esteel demanded return of the crane or payment of the \$11,000 balance of 24 July 1981, plus interest. In response Goodman & Sons sent Esteel a promissory note for \$11,000, together with its check for \$943.48 in interest. The check bore a clause purporting to be acknowledgment by Esteel of its acceptance of the promissory note by its endorsement of the check. Esteel did not endorse or cash the check.

On 2 June 1982, Esteel brought suit against Goodman & Sons, seeking return of the crane or, alternatively, damages for breach of the lease. That suit was subsequently discontinued after Goodman & Sons filed a voluntary petition in bankruptcy in September 1982. Thereafter, Esteel brought this suit against defendant B. Paul Goodman, individually, alleging a conversion of the crane.

The trial court, sitting without a jury, found that Goodman & Sons had not exercised its option to purchase the crane and, therefore, had converted it by selling it. Additionally, the court found that Goodman was personally liable for the conversion, and that the fair market value of the crane at the time of conversion was \$35,000. From judgment entered for Esteel for \$35,000, defendant appeals.

*Jack W. Westall, Jr., by K. G. Lindsey and Jack W. Westall, Jr., for plaintiff appellee.*

*Patla, Straus, Robinson & Moore, by Victor W. Buchanan for defendant appellant.*

MARTIN, Judge.

This appeal presents four questions. First, did the trial court err in not granting defendant's motion for involuntary dismissal at the close of the plaintiff's evidence? Second, did the court err

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Estee Co. v. Goodman

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in finding that the option to purchase the crane had not been exercised? Third, did the court err in finding defendant personally liable for the conversion of the crane? And fourth, did the court err in its determination of the fair market value of the crane at the time of conversion? We answer each of these questions negatively, and affirm the judgment of the trial court.

[1] Rule 41(b) of the Rules of Civil Procedure allows the defendant in a bench trial, when the plaintiff's presentation of evidence has been completed, to move for involuntary dismissal on the grounds that the plaintiff has shown no right to relief based upon facts or law. "The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence." G.S. 1A-1, Rule 41(b). The permissive language of the rule itself makes clear that the court may decline to render judgment until all of the evidence has been presented. *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973); *Passmore v. Woodard*, 37 N.C. App. 535, 246 S.E. 2d 795 (1978). In fact, a judge should decline to do so except in the clearest of cases. *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979); *Helms v. Rea*, *supra*. Clearly, then, the trial court committed no error by declining to grant defendant's motion for involuntary dismissal.

[2] Defendant's next contention is that the trial court erred by finding and concluding that the option to purchase the crane was never exercised. He contends that, the option having been exercised, a conversion never occurred. This case was tried without a jury; the judge sat as both trier of law and of fact. A court's findings of fact are conclusive if supported by any competent evidence, and judgments supported by such evidence will be affirmed, even though there is evidence to the contrary. *Transit, Inc. v. Casualty Co.*, 285 N.C. 541, 206 S.E. 2d 155 (1974); *Harrelson v. Insurance Co.*, 272 N.C. 603, 158 S.E. 2d 812 (1968). With respect to the exercise of the option to purchase, the trial court found:

9. That the Equipment Rental Agreement entered into between the Plaintiff and Al J. Goodman and Sons, Inc. provided that Al J. Goodman and Sons, Inc. had an option to purchase the truck crane but that the Defendant and Al J. Goodman and Sons, Inc. failed to comply with the terms of

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*Esteel Co. v. Goodman*

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the option as set forth in the contract between the Plaintiff and Al J. Goodman and Sons, Inc.

10. That Defendant B. Paul Goodman acting on behalf of Al J. Goodman and Sons, Inc. purported to exercise the option on or about July 24, 1981, but that said purported exercise of option was not effective because neither the Defendant nor Al J. Goodman and Sons, Inc. ever paid the purchase price nor was the purchase price tendered at any time to Esteel Company, and the truck crane remained the property of Esteel Company and not that of Al J. Goodman and Sons, Inc.

The court concluded that Goodman & Sons had not purchased the crane truck, that title thereto remained in Esteel, and that the sale of the machine constituted a conversion of it.

Defendant Goodman contends that there was evidence from which the trial court should have found that Goodman & Sons exercised its option to purchase the crane. Specifically, he points to letters which he sent to Esteel on 27 April 1981 and 24 July 1981, in which he referred to getting "this matter consummated" and "finally clearing the Pettibone 36 crane matter." Further, he argues, a purchase order which was enclosed with the 24 July 1981 letter showed a "balance due" for the crane of \$11,000 and contained a notation "No Tax—For Resale." While the letters and purchase order furnish some evidence of Goodman & Sons' intent to exercise the option, they do not amount to an unequivocal notification of its election to do so. Indeed, there was evidence to the contrary, including defendant's acknowledgment, in a letter to Esteel dated 15 February 1982, that he regretted selling the machine; his referral to a proposal he had made to Mr. Schrader in November 1981, after the crane had been sold to the Mexican company, to resolve the "problem"; and his further proposal for payment in a manner appreciably different from that specified in the option.

More significantly, there is the ambiguity of the option clause itself. The rental agreement granted Goodman & Sons with the option to purchase "with balance due of purchase price payable within 30 days of notification by lessee to lessor of election to purchase machine." Defendant Goodman argues that its purchase order of 24 July 1981 constituted notification of its election to ex-



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Esteel Co. v. Goodman

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ercise the option, and that under the terms of the option, the sale was complete and title passed upon such notification. According to his argument, payment within 30 days was merely a condition subsequent to the sale, giving rise only to a claim against Goodman & Sons for the balance of the purchase price. Esteel argues, however, that under the terms of the agreement both notification and payment were necessary to exercise the option and pass title to Goodman & Sons.

Because an option is a unilateral agreement with all obligations upon the optionor, the option agreement is to be construed strictly in the optionor's favor. *Lentz v. Lentz*, 5 N.C. App. 309, 168 S.E. 2d 437 (1969); *Builders, Inc. v. Bridgers*, 2 N.C. App. 662, 163 S.E. 2d 642 (1968). This is especially true where, as here, the optionee drafted the agreement, because ambiguous contract provisions are to be construed against the drafting party. *Contracting Co. v. Ports Authority*, 284 N.C. 732, 202 S.E. 2d 473 (1974). And an option must be accepted according to the terms of the option agreement. *Catawba Athletics v. Newton Car Wash*, 53 N.C. App. 708, 281 S.E. 2d 676 (1981).

The option agreement in this case is subject to either construction contended by the parties. Because it is ambiguous, the trial court properly construed the agreement strictly in favor of the optionor and non-drafting party, Esteel. So construed, the agreement requires payment of the purchase price within thirty days of notification in order to effectively exercise the option and pass title. The court found, upon uncontradicted evidence, that payment was never made and concluded that the option was not exercised. Thus, the court properly concluded that title to the crane remained in Esteel, and that a conversion was committed by its sale.

[3] The next question is whether defendant Goodman can be held personally liable for the conversion. It has long been established that an officer of a corporation who commits a tort is individually liable for that tort, even though the officer may have acted on behalf of the corporation in committing the wrongful act. *Mills v. Mills*, 230 N.C. 286, 52 S.E. 2d 915 (1949); *Records v. Tape Corp.*, 19 N.C. App. 207, 198 S.E. 2d 452, cert. denied, 284 N.C. 255, 200 S.E. 2d 653 (1973). The certificate guaranteeing the quality of the crane, which accompanied the sale of the crane, was

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**Estee Co. v. Goodman**

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signed by defendant Goodman in his representative capacity and defendant Goodman admitted his participation in the sale. The evidence supports the court's finding to that effect and its conclusion that defendant Goodman is personally liable for the conversion that sale caused.

[4] The final question for consideration is whether damages were properly determined. Damages for conversion are measured by the fair market value of the chattel at the time and place of conversion, plus interest. *Crouch v. Trucking Co.*, 262 N.C. 85, 136 S.E. 2d 246 (1964); *E-B Grain Co. v. Denton*, 73 N.C. App. 14, 325 S.E. 2d 522, *disc. rev. denied*, 313 N.C. 598, 330 S.E. 2d 608 (1985). Fair market value has been described as the price a buyer who was willing, but not compelled, to buy would pay a seller who was willing, but not compelled, to sell. *Barnes v. Highway Commission*, 250 N.C. 378, 109 S.E. 2d 219 (1959); *City of Kings Mt. v. Cline*, 19 N.C. App. 9, 198 S.E. 2d 64 (1973).

Defendant Goodman argues that Esteel did not present sufficient evidence to allow the court to reasonably ascertain the fair market value of the machine. A plaintiff must establish by evidence such facts as will furnish a basis for determination of damages. *Midgett v. Highway Commission*, 265 N.C. 373, 144 S.E. 2d 121 (1965). The plaintiff, however, does not have to prove damages with absolute certainty, but must present evidence with sufficient completeness to permit a reasonable determination of damages. *Service Co. v. Sales Co.*, 259 N.C. 400, 131 S.E. 2d 9 (1963); *McNair Construction Co. v. Fogle Bros. Co.*, 64 N.C. App. 282, 307 S.E. 2d 200 (1983).

In this case, the evidence with respect to fair market value consisted of the amount which Esteel had paid for the crane, the sale price contained in the agreement between Esteel and Goodman & Sons, and the cost of repairs and maintenance performed on the machine while in the possession of Goodman & Sons. Plaintiff offered the opinion of Mr. Schrader that the machine was worth \$60,000, but the trial court declined to base its decision on that evidence, finding that Mr. Schrader had no factual basis for his opinion. Likewise, the trial court rejected, as evidence of value, the price for which Goodman & Sons sold the machine to the Mexican company, because that price reflected extra equipment and was inflated due to the international nature of the sale. The court found:

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**Estee Co. v. Goodman**

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15. That the fair market value of the machine on or about October 14, 1981, was \$35,000.00 which is the same price as is described in the original lease agreement. The value of the machine at that time would have depreciated through ordinary wear and tear on the machine but the repairs made to the machine by Al J. Goodman and Sons, Inc. compensated for the normal wear and tear and depreciation which would otherwise have reduced the value of the machine or price less than the \$35,000.00 option price agreed upon by the parties in the original contract. Therefore, the fair market value of the machine, after having the value enhanced by the repairs, was \$35,000.00 at the time of the sale of the Pettibone Model 36 truck crane by the Defendant on or about October 14, 1981.

Evidence of the price paid for property, or its value within a reasonable time before or after the conversion, is probative of value where there has been no substantial change in the condition of the property, as is evidence of the characteristics of the property such as its condition and use. 1 H. Brandis, North Carolina Evidence 2d Rev. Ed. (1982) § 100. The trial court found, upon competent evidence, that the parties had agreed upon a sale price of \$35,000 approximately two years prior to the conversion and that through repairs and maintenance the condition of the machine had not substantially changed. In our view, the two year period between the rental agreement and the conversion does not constitute such an unreasonable period of time as to render irrelevant the evidence of the machine's value at the earlier time, especially in view of the evidence with respect to repairs and maintenance and defendant Goodman's certification to the Mexican purchaser, on 9 October 1981, that the machine was in excellent condition. We hold the evidence sufficient to support the trial court's finding as to fair market value.

The judgment of the trial court is

**Affirmed.**

Chief Judge HEDRICK and Judge PHILLIPS concur.

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**Peak v. Peak**

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DANIEL THOMAS PEAK v. JOAN MARIE WELCH PEAK

No. 8614DC44

(Filed 16 September 1986)

**1. Divorce and Alimony § 30— equitable distribution—pension benefits—effect of treatment as separate property—unequal division of property proper**

Where the statute in effect at the time plaintiff instituted his divorce action provided that pension benefits were separate property, and an amendment making them marital property took effect three days later, the trial court did not err in finding that the impact of the statute upon defendant was harsh and in using this finding as one of nine in forming an opinion that an equal distribution of marital property would not be equitable. N.C.G.S. § 50-20(c)(5) and (c)(12).

**2. Divorce and Alimony § 30— equitable distribution—savings account as marital property—division by parties—funds not changed to separate property**

Property acquired in exchange for marital funds is considered marital property to the extent of the contribution even after separation, and there was no merit to plaintiff's contention that, although savings account funds were once marital, an equal division by the parties upon separation changed the nature of the funds such that defendant's contribution for the purchase of a house in both parties' names but in which plaintiff resided was a mere loan of defendant's separate property.

**3. Divorce and Alimony § 30— equitable distribution—funds contributed by wife to husband after separation—increase in value—insufficiency of court's findings**

Where defendant contributed \$5,000 in marital property toward the purchase of a home for plaintiff one year after the parties' separation, she was entitled to an increase in the value of her original contribution, but the trial court's findings were insufficient to support a determination as to the reasonableness of the court's award of a \$3,000 increase.

**4. Divorce and Alimony § 20.3— attorney's fees—reasonableness of rates—findings insufficient**

The trial court erred in awarding attorney's fees to defendant where the court made sufficient findings as to the skill and time required and as to the nature of the services, but the court made no findings concerning whether the attorney's rates were in line with those customarily charged.

APPEAL by plaintiff from *Labarre, Judge*. Judgment entered 19 August 1985 in DURHAM County District Court. Heard in the Court of Appeals 18 August 1986.

Plaintiff and defendant were married on 6 July 1957, while plaintiff husband was still in medical school. Within a year of the marriage, the first of seven children was born, and the couple

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**Peak v. Peak**

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agreed that Ms. Peak would no longer work outside the home. Dr. Peak completed his medical training in psychiatry and at the time of the separation in 1974 was employed by Duke University.

The separation was an unusual one. For years the couple had not gotten along and were barely speaking to each other, yet, as Ms. Peak put it, the separation itself was "conducted like a marriage." The house Dr. Peak moved into was put in the names of both husband and wife. The children were divided between the two households, and Dr. Peak gave his wife half his income for the maintenance of her home. Each party had a key and free access to the other's house. Divorce was not even mentioned until 1981.

Approximately one year after the separation, plaintiff moved to Milwaukee, Wisconsin and set up practice there. Again he bought a house in both names and continued to support the defendant. Two years later plaintiff moved back to Durham, buying yet another house in both names. This house—on Cheviot Street—was later rented out. At the time of the trial, Dr. Peak resided in a house he bought in both names in the Bahama community. Ms. Peak has continued to live in the marital home.

Plaintiff filed this action on 29 July 1983 seeking absolute divorce and equitable distribution. Defendant counterclaimed for attorney's fees and alimony. Judgment was entered on 19 August 1985 granting an absolute divorce. The court ruled that an equal division of the property would not be equitable and awarded the defendant alimony and attorney's fees. Plaintiff appealed. Defendant did not give notice of appeal but petitioned for certiorari to this court. That petition was denied on 3 February 1986.

*Epting and Hackney, by Joe Hackney, for plaintiff-appellant.*

*Maxwell, Freeman and Beason, P.A., by James B. Maxwell, for defendant-appellee.*

WELLS, Judge.

[1] The first assignments of error concern pension benefits which Dr. Peak had accrued at Duke University. Plaintiff contends that the trial court wrongly considered a part of N.C. Gen. Stat. § 50-20 which took effect only after the plaintiff filed for divorce. At the time plaintiff instituted action on 29 July 1983,

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**Peak v. Peak**

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the applicable portion of the statute stated that "vested pension or retirement rights and the expectation of non-vested pension rights or retirement rights shall be considered separate property." G.S. § 50-20(b)(2) (1981). Only three days later—1 August 1983—an amendment took effect making vested pension or retirement rights marital property. G.S. § 50-20(b)(1) (1983). The trial court, under the "catchall" provision of G.S. § 50-20(c)(12), considered the timing of the action in deciding whether an equal distribution of the marital property would be equitable. That factor was among nine which the judge set out as the basis of his opinion that an equal distribution would not be equitable.

Whether an equal distribution would be fair to the parties is a question left to the broad discretion of the court. In order to establish error, the reviewing court must find a clear abuse of discretion and may only reverse upon a showing that the trial court's actions are "manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985). The catchall provision of G.S. § 50-20 allows the trial judge to consider "any other factor which [it] finds to be just and proper." G.S. § 50-20(c)(12). It was this subsection which the court cited when it found the following contested fact:

i. N.C.G.S. § 50-20(c)(12): The Court is aware that amendment to the Equitable Distribution Statute in North Carolina, which was effective August 1, 1983, would have allowed the pension benefits of Dr. Peak to have been included in the marital assets. The Court is further aware that the Legislature passed this amendment prior to the date this divorce action was filed, but the action was filed before the effective date. The impact upon Ms. Peak, as applied to this particular case, is considered by the Court to be harsh.

This finding did not, as plaintiff contends, "operate to invalidate a legislative enactment" thus making pension rights separate property. The trial court merely took into account the effect which that classification would have upon Ms. Peak when it was deciding whether an equal division of marital property would be equitable. This is not only allowed, it is mandated under G.S. § 50-20(c)(5) as it then existed: "The court shall consider . . . vested pension or retirement rights and the expectation of non-vested pension or retirement rights, which are separate property." This the court did in an earlier finding:

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**Peak v. Peak**

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c. N.C.G.S. § 50-20(c)(5): Dr. Peak has vested pension and/or retirement rights with the State of North Carolina and through TIAA, in excess of Seventy Thousand Dollars (\$70,000.00) at the present time, and the benefits at Duke University through TIAA had been accumulated during the course of the marriage and while the parties were living together.

Therefore, the court's use of G.S. § 50-20(c)(12) was essentially a superfluous restatement of its finding under G.S. § 50-20(c)(5) and was not error.

Plaintiff next assigns error to the court's failure to set forth a standard of proof in its determination that an equal division of property would not be equitable. We disagree. Nine of the twelve factors set out in G.S. § 50-20(c) were addressed in detail by the court, and the weight to be given each of these lies in the judge's discretion. *White, supra*. This assignment is overruled.

[2] Plaintiff next assigns error to the court's treatment of the Cheviot Street property which was bought after the couple separated. The court found that the property was part marital and part separate and placed an \$8,000 judgment lien on it. This figure represents a \$5,000 contribution to the purchase price of the house and a \$3,000 increase in its value. Although the trial court did not specify its rationale in its conclusions, it apparently relied on our decision in *Wade v. Wade* adopting the "source of funds" rule. 72 N.C. App. 372, 325 S.E. 2d 260, *disc. rev. denied*, 313 N.C. 612, 330 S.E. 2d 616 (1985). That rule allows the court to determine that a single piece of property may be both marital and separate in nature. *Id.* In such a case, "each estate is entitled to an interest in the property in the ratio its contribution bears to the total investment in the property." *Id.* Plaintiff acknowledges such a rule but denies its applicability here.

When Dr. and Ms. Peak separated in 1974, they divided a savings account which consisted of the proceeds from the sale of some property. Each party received approximately \$7,000. Plaintiff bought a house in Durham and lived there for about a year. During that time, the parties shared expenses, took vacations together and had free access to the other's house. Dr. Peak later left Duke University and set up practice in Milwaukee, Wisconsin. Ms. Peak withdrew \$5,000 from her share of the proceeds of the

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**Peak v. Peak**

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property to help her husband make a downpayment on a house in Milwaukee, which was put in both names. When Dr. Peak moved back to Durham, he sold the Milwaukee house at a profit of between nine and fourteen thousand dollars. He purchased the Cheviot Street house in both names and lived there until he bought another home in Durham. The Cheviot Street house was rented out and at the time of the trial was generally paying for itself. Plaintiff never repaid the \$5,000 contributed by his wife.

The threshold question is whether the court properly designated the funds as marital property. Property acquired after separation of the parties is specifically excepted from the definition of marital property contained in the 1983 cumulative supplement to G.S. § 50-20(b)(1), the applicable law in this case. See *Wilson v. Wilson*, 73 N.C. App. 96, 325 S.E. 2d 668, *disc. rev. denied*, 314 N.C. 121, 332 S.E. 2d 490 (1985). However, property acquired in exchange for marital funds is considered marital property to the extent of the contribution even after separation. *Phillips v. Phillips*, 73 N.C. App. 68, 326 S.E. 2d 57 (1985). Plaintiff contends that, although the funds in question were once marital, an equal division by the parties upon separation changed the nature of the funds such that Ms. Peak's contribution was a mere loan of her separate property. We disagree.

In *Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E. 2d 915 (1985), we looked to the wording of the equitable distribution statute in deciding a similar issue. Although the statute instructs the trial court to enforce agreements providing for the distribution of marital property, these must be "written . . ., duly executed and acknowledged in accordance with G.S. § 52-10 and 52-10.1." G.S. § 50-20(d). The purpose of this requirement is to prevent fraud and overreaching by one of the spouses. *McIntosh v. McIntosh*, 74 N.C. App. 554, 328 S.E. 2d 600 (1985). In *Weaver*, the couple had orally agreed at the time of separation to split their furnishings among the two households. The trial court chose to enforce the agreement on the grounds that it was satisfactory to both parties at the time, and we reversed. In the instant case, we find that a simple oral division of marital funds at separation should not be binding on the parties. The trial court was correct in its designation of the \$5,000 as marital property.

[3] The next question is whether the trial court properly allotted the defendant an increase in the value of her original



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**Peak v. Peak**

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\$5,000 contribution. Plaintiff contends that, under G.S. 50-21(b), the funds must be valued for marital property distribution as of the date of separation and that the trial court erred in awarding the defendant more than \$5,000. We disagree. Our decision in *Swindell v. Lewis*, No. 852DC1251 (N.C. App., filed 5 August 1986), addressed the issue of appreciation between the date of separation and the final judgment of divorce. In that case, the couple separated in 1972, when the marital real property was valued at \$316,193. When absolute divorce was granted eleven years later, the property was worth \$913,889. The trial court determined that an equal division of the properties was equitable and ordered that each party receive a one-half undivided interest in each piece of property as it was valued in 1983. The appellants in that case—the decedent husband's heirs and the administrator of the estate—contended that the wife's share should have been half of the value of the property at the time of separation, or \$158,096.50. We held, however, that each party is entitled to a proportionate share of the return on his or her separate property. Since the court decided upon an equal distribution of the marital property, Ms. Swindell would get 50% of its value at the time of separation plus 50% of any appreciation. Since the total amount under this formula was the same as half the value of the property at the time of the decree, further revisions were unnecessary and we affirmed the decision of the lower court.

We now turn to the case at bar. Although Ms. Peak is entitled to a proportionate return on the \$5,000 in marital funds which the court included in her share of the property, there are not sufficient findings upon which to determine the reasonableness of the court's award of a \$3,000 increase. The appropriate disposition of this issue will require the trial court to determine the following: (1) the value of the Milwaukee property at the time it was acquired; (2) the relationship or ratio of the \$5,000 investment by Ms. Peak to that value; and (3) the appreciation in value at the time of sale attributable to Ms. Peak's investment. Similar findings must also be made as to the Cheviot Street property. We therefore remand to the trial court for appropriate findings as to this issue. As the final disposition of this issue may affect the trial court's judgment as to an equitable distribution of the entire marital estate, we therefore reverse the judgment entered and

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**Peak v. Peak**

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remand the entire equitable distribution case for further findings, conclusions and judgment.

[4] The plaintiff next argues that the court's order awarding the defendant counsel fees was not supported by sufficient findings of fact. We agree. The general rule is that once a party's entitlement to counsel fees in a domestic case has been shown, the court decides upon a reasonable fee. Although the amount is within the court's discretion, the order must contain findings of fact as to the basis of the award. These include the nature and scope of the legal services, the skill and time required, and the relationship between the fees customary in such a case and those requested. *Owensby v. Owensby*, 312 N.C. 473, 322 S.E. 2d 772 (1984). The purpose of such findings is to enable a reviewing court to determine the reasonableness of the award. *Id.*

In the case at bar, the trial court took into account "the magnitude of the services performed, the nature of the services that have been rendered to Ms. Peak [and] the unusual and complex issues raised by a ten-year separation." The court then found that "the total number of hours of 57.7 were both reasonable and necessary in connection with the representation of Ms. Peak; of that total amount of time, the court finds that 33.9 hours were related predominately to the issues involving the custody and support of the children and the alimony claim of Ms. Peak." These findings are sufficient as to the skill and time required and as to the nature of the services, but the court found no facts concerning whether the attorney's rates were in line with those customarily charged. We therefore remand for further findings on that issue.

The decision appealed from is affirmed in part, reversed in part and remanded.

Chief Judge HEDRICK and Judge WEBB concur.

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State v. Newell

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## STATE OF NORTH CAROLINA v. WILLIAM K. NEWELL, III

No. 8628SC259

(Filed 16 September 1986)

**1. Constitutional Law § 30; Process § 6— subpoenas duces tecum—irrelevant material requested—fishing expedition—quashing proper**

In a prosecution of defendant for taking indecent liberties with a child, the trial court did not err in quashing subpoenas *duces tecum* issued by defendant upon a children's home for the production of all its files and records relating to the victim and another witness, both of whom were residents of the home, since the items were not within the prosecutor's possession, custody, or control and thus were not subject to discovery as of right; the subpoenas amounted to a "fishing expedition"; the requested files and records contained many items irrelevant to the inquiry; and many of the items sought were protected by the physician-patient, psychologist-client, or counselor privilege.

**2. Criminal Law § 131— post-trial motion for appropriate relief—no showing of newly-discovered evidence**

The trial judge did not err in denying defendant's post-trial motion for appropriate relief pursuant to N.C.G.S. § 15A-1415 where defendant did not show in his affidavit any new evidence which would do more than contradict, impeach or discredit a witness at trial.

**3. Criminal Law § 91— continuance to prepare for trial—motion properly denied**

There was no merit to defendant's contention that the trial court erred in denying his motion to continue made on the ground that defense counsel did not have an opportunity to look at the transcript of defendant's first trial until the morning of the second trial and he therefore did not have time to prepare adequately for cross-examination of the State's witnesses, since defendant, himself a lawyer, had had the transcript of the first trial in his possession three days before the first day of the second trial; defense counsel had appeared at the first trial and was thoroughly familiar with the case; the transcript was not long and the case not complicated; and defense counsel made effective use of the transcript in his cross-examination of the State's witnesses.

**4. Criminal Law § 138.14— presumptive sentence—no aggravating or mitigating factors found**

Where defendant was sentenced to the presumptive term of three years upon conviction of taking indecent liberties with a child, the trial court was not required to find aggravating or mitigating factors.

Judge PHILLIPS concurring in result.

APPEAL by defendant from *Albright, Judge*. Judgment entered 24 October 1985 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 19 August 1986.

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**State v. Newell**

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Defendant was charged in a proper bill of indictment with taking indecent liberties with a child in violation of G.S. 14-202.1. He was found guilty as charged. From a judgment imposing a prison sentence of three years, defendant appealed.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Lucien Capone, III, for the State.*

*Roberts, Stevens & Cogburn, P.A., by Max O. Cogburn and Allan P. Root, for defendant, appellant.*

HEDRICK, Chief Judge.

[1] Defendant first contends that the trial court erred to his prejudice in quashing subpoenas *duces tecum* issued by defendant upon the Eliada Home for Children for the production of all of its files and records relating to the victim and another witness, both of whom were residents of the Home.

There is no common law right of discovery in criminal cases, *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983), and there is no statute that grants a defendant in a criminal trial access as of right to any documents unless they are "within the possession, custody, or control of the State." G.S. 15A-903(d). This has been interpreted to mean "within the prosecutor's possession, custody or control." *State v. Crews*, 296 N.C. 607, 616, 252 S.E. 2d 745, 752 (1979). Since the files and records in question here were not within the prosecutor's possession, custody, or control, they were not subject to discovery as of right.

However, documents not subject to the criminal discovery statute may still be subject to a subpoena *duces tecum*. The subpoena *duces tecum* is the process by which a court requires that particular documents or other items which are material to the inquiry be brought into court. It is issued by the clerk of court, and can be issued to any person who can be a witness. G.S. 7A-103(1); *Vaughan v. Broadfoot*, 267 N.C. 691, 149 S.E. 2d 37 (1966).

The purpose of the subpoena *duces tecum* is to require the production of specific items patently material to the inquiry. *Id.* Therefore, it must specify with as much precision as fair and feasible the particular items desired. *Id.*

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State v. Newell

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Discovery is not a proper purpose for a subpoena *duces tecum*; anything in the nature of a mere "fishing expedition" will not be allowed. *Id.* A party is not entitled to have brought in a mass of books and papers in order that he may search them through to gather evidence. *Id.* To hold otherwise would not only cause the subpoenaed person often to be unfairly burdened, but would also obligate him to produce a number of items not material to the inquiry, which is clearly not authorized by law.

A motion to quash a subpoena *duces tecum* is addressed to the sound discretion of the trial judge, and is not subject to review absent a showing of abuse of discretion. *Id.* In exercising that discretion, the trial judge should consider the relevancy and materiality of the items called for, the right of the subpoenaed person to withhold production on other grounds, such as privilege, and also the policy against "fishing expeditions." *Id.*

In the present case, the subpoenas called for all files and records relating to the victim and another witness. This is a very broad category, certain to include many items completely irrelevant to the inquiry. This may be acceptable in a motion for discovery, but it is inappropriate in a subpoena *duces tecum*. Furthermore, in examining the documents produced by the Eliada Home for *in camera* inspection, we found that only a tiny fraction of them are even arguably material to the inquiry, and that a good many of them are privileged under either G.S. 8-53 (physician-patient privilege), G.S. 8-53.3 (psychologist-client privilege), or G.S. 8-53.8 (counselor privilege). Under these circumstances, we cannot find that the trial judge abused his discretion in quashing the subpoenas *duces tecum*.

Defendant next contends that the trial court erred to his prejudice in sustaining objections to questions asked of Louise Ordway, a social worker at the Eliada Home for Children, relating to the reasons for the victim's commitment to the Home. However, defense counsel did not have Mrs. Ordway's answers to these questions placed in the record for appellate review. Where the record fails to show what the answers would have been had the witness been permitted to answer, the exclusion of such testimony cannot be held prejudicial, and thus is not reversible error. *State v. Wilhite*, 308 N.C. 798, 303 S.E. 2d 788 (1983).

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**State v. Newell**

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[2] Defendant next contends that the trial court erred to his prejudice in denying defendant's post-trial motion for appropriate relief pursuant to G.S. 15A-1415. Defendant, in his motion, requested that defense be allowed to inspect the victim's juvenile court record. Defendant argues that something in her juvenile record may be relevant to impeach the testimony of Mrs. Ordway that the victim had, to her knowledge, "always be[en] truthful." As appropriate relief, defendant argues that he is entitled to a new trial in order to impeach Mrs. Ordway's testimony.

The statute which defendant claims gives him grounds for his motion is G.S. 15A-1415(b)(6), which provides that such a motion may be made on the ground that evidence is available which was unknown or unavailable to the defendant at the time of the trial, which could not with due diligence have been discovered or made available at that time, and which has a direct and material bearing upon the guilt or innocence of the defendant.

A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial judge and is not subject to review absent a showing of an abuse of discretion. *State v. Beaver*, 291 N.C. 137, 229 S.E. 2d 179 (1976). In order for a court to grant such a motion it must appear by affidavit that, among other things, "the new evidence does not merely tend to contradict, impeach, or discredit the testimony of a former witness." *Id.* at 143, 229 S.E. 2d at 183. This requirement was clearly not met by defendant in the present case. We hold, therefore, that the trial judge did not abuse his discretion in denying defendant's motion.

[3] Defendant next contends that the trial court erred to his prejudice in denying his motion to continue. The case had previously been mistried. Defendant claims that defense counsel did not have a chance to look at the transcript of the first trial until the morning of the second trial, and therefore he did not have time to prepare adequately for cross-examination of the State's witnesses. Defendant argues that under these circumstances, denial of his motion to continue deprived him of his constitutional right to counsel.

Ordinarily, a motion to continue is addressed to the sound discretion of the trial judge, and his ruling thereon is not subject to review absent a showing that he abused that discretion. How-

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*State v. Newell*

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ever, when a motion to continue is based on a constitutional right, the question presented is a reviewable question of law. *State v. McFadden*, 292 N.C. 609, 234 S.E. 2d 742 (1977), *State v. Williams*, 51 N.C. App. 613, 277 S.E. 2d 546 (1981). The burden is on the defendant to show a clear denial of this right. *Id.*

In the present case, as the trial court found, (1) defendant, himself a lawyer, had had the transcript of the first trial in his possession three days before the first day of the second trial, (2) defense counsel had appeared at the first trial and was thoroughly familiar with the case, and (3) the transcript itself was not long, and the case was not complicated. Furthermore, the transcript of the second trial reveals that defense counsel made effective use of the transcript of the first trial in his cross-examination of the State's witnesses. Under these circumstances, we cannot find that defendant has met his burden of showing a clear denial of his constitutional right to counsel.

Defendant next contends that the trial court erred to his prejudice in permitting the prosecutor to cross-examine Shelby Horton, defendant's law partner, concerning his attempts to dissuade the Eliada Home and the District Attorney from prosecuting defendant. This testimony was never objected to during trial, and thus is not subject to appellate review. *Hanna v. Brady*, 73 N.C. App. 521, 327 S.E. 2d 22, *disc. rev. denied*, 313 N.C. 600, 332 S.E. 2d 179 (1985).

[4] Defendant lastly contends that the trial court erred to his prejudice in failing to find mitigating factors during sentencing. Defendant was convicted pursuant to G.S. 14-202.1, an offense punishable as a Class H felony. Since defendant was sentenced to the presumptive term of three years, the trial judge was not required to find aggravating or mitigating factors. G.S. 15A-1340.4, *State v. Byrd*, 67 N.C. App. 168, 312 S.E. 2d 528 (1984).

We hold that defendant had a fair trial, free from prejudicial error.

No error.

Judge MARTIN concurs.

Judge PHILLIPS concurs in the result.

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**Hochheiser v. N. C. Dept. of Transportation**

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Judge PHILLIPS concurring in the result.

While I agree that defendant's trial was free of prejudicial error I do not agree with much that is said in the majority opinion about the subpoena *duces tecum* and the court's justification for quashing it. The subpoena was properly obtained, in my opinion, as counsel had good reason to suppose that the records involved—of two juvenile delinquents—might contain information detrimental to their credibility as witnesses, which was the controlling issue in the case; and rhetorical but largely meaningless cliches such as "fishing expeditions" and legislatively created privileges must yield to a defendant's right to a fair trial. Thus the court had a duty to examine the subpoenaed records and to determine whether they contained anything of material benefit to defendant in the trial of the case; and if they had, due process, as well as the statutory provisions that created the privileges involved, would have required the court to make such information available to defendant, even though the relevant and helpful information in the records was vastly exceeded by information that was neither relevant nor helpful. But, as the trial court correctly found, the records subpoenaed contained nothing that the defendant could have properly utilized in defending the charge brought against him.

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ANDREE T. HOCHHEISER, ADMINISTRATOR OF THE ESTATES OF CLAUDINE HOCHHEISER AND RENEE HOCHHEISER, DECEASED v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 8610IC152

(Filed 16 September 1986)

**State § 5; Highways § 9.2— death of motorists—no guardrail at scene of accident—no recovery under Tort Claims Act**

In an action for death benefits pursuant to the N. C. Tort Claims Act, N.C.G.S. § 143-291, where the evidence tended to show that plaintiffs two daughters were killed in an automobile accident which occurred when the vehicle hit a patch of ice on a stretch of secondary road unprotected by a guardrail and then fell down an embankment, defendant's intentional, discretionary decision not to erect a guardrail at the site was not so clearly unreasonable as to amount to oppressive and manifest abuse so as to invoke the jurisdiction of the judiciary or the Industrial Commission to review the discretionary policy-



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**Hochheiser v. N. C. Dept. of Transportation**

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making decisions of defendant; defendant's intentional, discretionary decision was not a breach of any duty imposed upon it by the facts and circumstances of this case; and the evidence and findings of fact failed to support the conclusion that defendant was negligent in any respect in this case within the meaning of the Tort Claims Act or that any act or omission on the part of defendant was the proximate cause of the accident and deaths of plaintiff's children.

APPEAL by defendant from an opinion and award of the North Carolina Industrial Commission. Order entered 4 October 1985. Heard in the Court of Appeals 25 August 1986.

These claims arose out of an accident which occurred on 5 February 1980 on Newton Road in Wake County. Plaintiff filed claims for death benefits pursuant to the North Carolina Tort Claims Act, G.S. 143-291. The claims first came on for hearing before Deputy Commissioner Brenda B. Becton. The evidence presented at the hearing revealed the following uncontroverted facts. At approximately 8:00 a.m. on 5 February 1980 Renee and Claudine Hochheiser, ages 17 and 15, were driving along Newton Road en route to Ravenscroft School where they were students. The vehicle in which they were traveling hit a patch of ice, began to skid and fell down an embankment. Both Renee and Claudine Hochheiser died as a result of the accident.

Deputy Commissioner Becton made detailed findings of fact briefly summarized as follows: Renee and Claudine Hochheiser were killed when the car in which they were traveling hit a patch of ice, began to skid, and overturned down an embankment on the side of Newton Road. At the time of the accident Newton Road was a paved secondary road 21 feet wide with a 6-foot shoulder. Beside the shoulder at the point of the accident there was a 20- to 25-foot embankment, with a two-to-one vertical slope, extending along the shoulder approximately 42 feet. The embankment was hidden by vegetation. At the bottom of the embankment was a stream of water flowing from a culvert. The accident occurred at the bottom of a slight downhill decline in Newton Road. At the point of the accident there was no guardrail protecting travelers from falling down the embankment. The Department of Transportation had a duty, which it did not fulfill in this case, to inspect locations such as Newton Road for the existence of hazardous conditions like the one in this case. A reasonably prudent engineer would have inspected the accident site, identified it as particularly hazardous and installed a guardrail. The presence of a guard-

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Hochheiser v. N. C. Dept. of Transportation

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rail along this portion of Newton Road would have prevented the deaths of the plaintiff's children. There is no evidence tending to show any negligence on the parts of Renee or Claudine Hochheiser. Other findings necessary to an understanding of the case are set out in the opinion.

Based upon these findings of fact Deputy Commissioner Becton concluded that the deaths of Renee and Claudine Hochheiser were proximately caused by defendant's negligence in failing to "exercise the care which a reasonably prudent person would exercise in the discharge of their duties to make the area in and around the site of the accident reasonably safe for its intended use." She then entered an opinion and order awarding to plaintiff \$100,000 each for the deaths of her daughters, the maximum award allowable under G.S. 143-291. A majority of the Industrial Commission entered an order adopting "as its own the Decision and Order filed by Deputy Commissioner Brenda B. Becton . . . ." Commissioner Stephenson dissented and filed an opinion. Defendant appealed.

*Marc W. Sokol and Marshall and Solomon, by Donald H. Solomon, for plaintiff appellee.*

*Attorney General Lacy H. Thornburg, by Assistant Attorney General George W. Lennon, for the State.*

HEDRICK, Chief Judge.

The critical facts giving rise to these claims are not in dispute. The one question raised by this appeal is whether the uncontroverted facts support the award of death benefits to plaintiff under G.S. 143-291, the North Carolina Tort Claims Act. Stated another way, the question before us is whether these claims "arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina." G.S. 143-291.

At common law the State was not liable for negligence or torts committed by the State or its agents in carrying out governmental duties and functions. *Moody v. State Prison*, 128 N.C. 12,

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Hochheiser v. N. C. Dept. of Transportation

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38 S.E. 131 (1901). It is well-established that the State cannot be sued in its own courts unless and until it expressly consents to be sued. *Insurance Co. v. Gold, Commissioner of Insurance*, 254 N.C. 168, 118 S.E. 2d 792 (1961). By enacting G.S. 143-291, the Tort Claims Act, the legislature waived the State's sovereign immunity for claims arising "as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina." G.S. 143-291.

In the present case plaintiff claims, and the Commission seems to conclude, that the Department of Transportation, an agency of the State, was negligent because of its failure to construct a guardrail along the existing secondary road at the point where this accident occurred, resulting in the deaths of Renee and Claudine Hochheiser. The specific question, therefore, before us is whether the State of North Carolina can be held liable under the Tort Claims Act for its decision, acting through the Department of Transportation and its employees, not to construct a guardrail on its right-of-way adjacent to Newton Road at the point where the Hochheiser vehicle ran off the highway and overturned down the embankment.

Before we can say that defendant was negligent with respect to its failure to erect the guardrail in question, it must be determined that the Department of Transportation had a duty to the traveling public to erect such a guardrail. In an effort to show that defendant had a duty in this regard the Commission made numerous findings of fact regarding defendant's duty to inspect this particular highway:

. . . .

7. During the period from 1967 to the time of the accident, standards and guidelines had been established by the American Association of State Highway and Transportation Officials and the Federal Government, and a body of research had been developed which established a methodology for dealing with roadside hazards. These standards and guidelines, research, studies, and literature, all of which pointed strongly toward a duty to identify and remedy roadside

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**Hochheiser v. N. C. Dept. of Transportation**

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hazards, were available to and used by the North Carolina Department of Transportation personnel prior to the date of the accident.

8. The Board of Transportation and the Department of Transportation have delegated to the division and district engineers the responsibility of inspecting the roads, and locating and remediating potentially hazardous sites with an eye toward safety and improvement as required by Federal statute and by professionally recognized standards.

9. The Division of Highways has an obligation to conduct periodic reviews on secondary roads. The Department of Transportation established a Safety Program prior to 1980, but this program was designed to identify sites where accidents frequently occur. It did not identify hazardous sites.

. . . . .

11. It is the responsibility of the district engineer to determine whether dangerous conditions or obstacles have arisen on existing roads.

12. The county maintenance supervisor, a position under the supervision of a district engineer, is responsible for conducting periodic reviews of a road for the existence of hazards that might develop.

. . . . .

15. From 1967 to 1983, the Division of the Department of Transportation that included Wake County had no established procedures for periodic review of secondary roads to determine whether guardrails or other safety devices should be installed on existing roads.

. . . . .

17. Stewart Sykes has been a District Engineer for Wake County since June of 1977. From 1974 to 1977, [h]e held the position of Assistant District Engineer for Wake County. As District Engineer, Mr. Sykes' duties include recommending guardrail installations on existing roads and he, along with several others, have a duty to look for dangerous locations on roadways. There was no system, however, for periodic re-

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**Hochheiser v. N. C. Dept. of Transportation**

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view of a need for safety devices, such as barriers or guard-rails, on secondary roads.

18. During the period from at least 1967 until the time of the accident, none of the employees of the North Carolina Department of Transportation having the authority and duty to inspect the roadways and make decisions regarding identification and remediation of roadside hazards, conducted any inspection of Newton Road with an eye to identification and remediation of any existing roadside hazards.

19. A reasonably prudent engineer exercising reasonable care would have identified the location as hazardous and would have made the location safe by the installation of a barrier.

These statements by the Commission, denominated findings of fact, insofar as they purport to delineate defendant's duty to the traveling public, are really no more than erroneous conclusions of law. We note that the highway in this case was an "existing secondary road" not originally built by defendant which came under defendant's control no later than 1967. This is not a situation in which defendant failed properly to maintain and repair an existing highway under its control. Newton Road, as originally designed and constructed, did not include a guardrail at the accident site. Defendant had actual or constructive knowledge of the absence of a guardrail through one or more of its employees. We can assume that defendant made a conscious, informed choice not to put a guardrail at this particular location and that its decision not to erect a guardrail was not a negligent omission. Thus, the Commission's findings or conclusions regarding defendant's duty to inspect are irrelevant and immaterial.

The Department of Transportation has the authority, duty and responsibility to plan, design, locate, construct and maintain the system of public highways in this State. G.S. 143B-346; *Equipment Co. v. Hertz Corp. and Contractors, Inc. v. Hertz Corp.*, 256 N.C. 277, 123 S.E. 2d 802 (1962). The Department is vested with broad discretion in carrying out its duties and responsibilities with respect to the design and construction of our public highways. See *Guyton v. Board of Transportation*, 30 N.C. App. 87, 226 S.E. 2d 175 (1976). The policies of the Board of Transportation and the Department of Transportation and the myriad discretionary decisions made by them as to design and construction are

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**State v. Bullard**

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not reviewable by the judiciary "unless [their] action is so clearly unreasonable as to amount to oppressive and manifest abuse." *Id.* at 90, 226 S.E. 2d at 177.

We hold that the Department of Transportation's intentional, discretionary decision not to erect a guardrail at the site of this accident was not "so clearly unreasonable as to amount to oppressive and manifest abuse" so as to invoke the jurisdiction of the judiciary or the Industrial Commission to review the discretionary policy-making decisions of the Department of Transportation. We further hold that defendant's intentional, discretionary decision was not a breach of any duty imposed upon it by the facts and circumstances of this case. We hold that the evidence and the findings of fact fail to support the conclusion that defendant was negligent in any respect in these cases within the meaning of the Tort Claims Act, G.S. 143-291, or that any act or omission upon the part of defendant was the proximate cause of the accident and the deaths of Renee and Claudine Hochheiser.

Reversed.

Judges ARNOLD and WELLS concur.

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STATE OF NORTH CAROLINA v. GLENN WAYNE BULLARD

No. 8616SC388

(Filed 16 September 1986)

**1. Criminal Law § 75— confession—voluntariness—admissibility**

Evidence was sufficient to support the trial court's finding that defendant's statement was freely, voluntarily, and understandingly made where it tended to show that an officer went to defendant's residence; defendant was coherent; no promises or inducements were made to defendant for making a statement; defendant made a statement which the officer recorded; the officer read it back to defendant who agreed that it was accurate; defendant read the statement himself; defendant indicated that he had completed the tenth grade; and defendant signed the statement in the presence of the officer.

**2. Kidnapping § 1.2; Rape § 5— first degree kidnapping and rape—variations in testimony—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for first degree rape and first degree kidnapping, and variations among the

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**State v. Bullard**

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victim's testimony and confessions of two codefendants created discrepancies for the jury to resolve but did not warrant dismissal; furthermore, there was no merit to defendant's contention that he was entitled to dismissal because the victim's testimony was irreconcilable with certain physical facts established by the State's own uncontradicted evidence.

**3. Criminal Law § 124.5; Rape § 5— two defendants—inconsistent verdicts—conviction for lesser-included offense proper**

There was no merit to defendant's contention that it was error for the trial court to allow an inconsistent jury verdict which found his codefendant not guilty of kidnapping or first degree rape while the same jury found defendant guilty of second degree rape; nor was there error in defendant's conviction for the lesser-included offense of second degree rape, though he contended that all the evidence would indicate that, if he were guilty of rape at all, then he would be guilty of first degree rape.

APPEAL by defendant from *Beaty, Judge*. Judgment entered 21 January 1986 in ROBESON County Superior Court. Heard in the Court of Appeals 28 August 1986.

Defendant was tried on indictments charging him with first degree rape and first degree kidnapping. The State's evidence tended to show, in pertinent part, that:

On 24 August 1985 around 10:00 p.m., the victim, a fifteen-year-old girl, was waiting at a service station for her older sister to make a phone call when defendant, Terry Locklear, and Leonard Hunt approached her in a car operated by Locklear. Defendant pushed the victim into the rear seat of the two-door car, and Locklear drove the car away from the service station. After driving for about ten or fifteen minutes, Locklear stopped the car on a dirt road, and each man raped the victim in the back seat of the car. Defendant and his companions then brought the victim to a "Red and White" store where they let her out of the car.

At trial the State introduced, and the court admitted, the confessions of defendant and Terry Locklear, who was tried with defendant. Regarding defendant, the jury returned a verdict of guilty of second degree rape. Defendant Locklear was found not guilty on all charges. Defendant appealed from a judgment of imprisonment.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Roy A. Giles, Jr., for the State.*

*Robert D. Jacobson for defendant-appellant.*

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State v. Bullard

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WELLS, Judge.

[1] Defendant contends the court erred by denying his motion to suppress his confession. Specifically, defendant contends his confession "was not voluntarily and understandingly made." We disagree.

"Where the trial judge finds upon competent evidence that defendant's statements were made freely and voluntarily after having been fully advised of his constitutional rights, such a finding is conclusive and will not be disturbed on appeal." *State v. White*, 298 N.C. 430, 436-37, 259 S.E. 2d 281, 285 (1979). *See also State v. Simpson*, 314 N.C. 359, 334 S.E. 2d 53 (1985). This is the rule even though the evidence is conflicting. *Simpson, supra*. After conducting a *voir dire*, the court here found that defendant's confession "was made freely, voluntarily, and understandingly [and that] defendant fully understood his constitutional rights to remain silent and his right to counsel, and, finally, that . . . [he] freely, knowingly and intelligently and voluntarily waived each of these rights and thereupon made the statement to Deputy Clark . . . ."

Defendant contends that the testimony of Foster Locklear, the father of Terry Locklear, shows that defendant "could not understandingly make a confession." On *voir dire*, Foster Locklear testified that as to defendant's ability to read and write that defendant "might can write his name, but as far as writing a letter or something . . . he wouldn't have the education to do that, because . . . he went to school just to be going; I'll put it like that." Locklear further testified that defendant dropped out of school during the tenth grade.

Officer Clark testified on *voir dire* that, when he first met defendant at defendant's residence, defendant was coherent. Officer Clark testified that he did not promise defendant anything or give him any inducement for making a statement. At no time, according to Officer Clark, was defendant under any kind of pressure, coercion or influence to give a statement involuntarily. Officer Clark's testimony continued:

A. When we began I asked him a few questions and he would respond and then I just told him, I said, "just go ahead and tell me what took place," and he more or less narrated it



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State v. Bullard

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and then as I went back to reduce it to writing I would ask him questions more or less to recollect what he had told me to begin with.

Q. Okay. Once you got done writing it down, did you read it back to him?

A. I did.

Q. Did he agree that what you had written down was an accurate rendition and recollection of his statement?

A. He did.

Q. Did you give him the opportunity to look it over himself?

A. I did.

Q. Did he ever—did he do so?

A. Yes, sir.

Q. Did he appear to be reading it?

A. He did.

Q. Did he ever indicate to you that he had any deficiency in schooling such that he could not read?

A. He did not.

Q. Did you happen to ascertain how far he had gone in school?

A. I did.

Q. How far did he say?

A. He stated he completed the 10th grade.

Q. All right. Once having gone over the statement with him and having given him the opportunity to go over the statement and it appearing that he appeared to be doing that, did you give him the opportunity to sign the statement?

A. I did.

Q. Did he sign the statement?

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State v. Bullard

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A. Yes, sir.

Q. In your presence?

A. Yes, sir.

We hold that Officer Clark's testimony shows that defendant understood the events which his statement related to and understood the effect of making his statement. This evidence was sufficient to support the court's finding that defendant's statement "was made freely, voluntarily, and understandingly." Accordingly, this assignment of error is overruled.

[2] Defendant contends the court erred in denying his motions to dismiss. We disagree.

Upon a motion to dismiss in a criminal action,

[t]he evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion. [Citations omitted.]

*State v. Powell*, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1980).

To prove its case the State primarily relied on the testimony of the victim and the confessions by defendant and Terry Locklear. Defendant maintains that the statements given by himself, Locklear and the victim "were completely and totally irreconcilable" because, while the victim indicated that Hunt raped her first, defendant stated that Locklear raped her first, and Locklear stated that he was the only one who had sex with her and that defendant was nowhere around.

We hold that the variations among the victim's testimony and the two confessions are not "completely and totally irreconcilable," as defendant argues, but at most create a discrepancy in the State's case. "Contradictions and discrepancies, even in the State's evidence, are matters for the jury and do not warrant nonsuit." *State v. Bolin*, 281 N.C. 415, 424, 189 S.E. 2d 235, 241 (1972). See also *Powell*, *supra*.

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*State v. Bullard*

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Defendant further contends in support of his motions to dismiss that the victim's testimony "was irreconcilable with certain physical facts that were established by the State's own uncontradicted evidence." Specifically, it is impossible, according to defendant, for two people to have intercourse in the back seat of a two-door car while a third person holds the victim. However, the evidence when viewed in the light most favorable to the State suggests no such physical impossibility.

For the foregoing reasons, we hold that the court properly denied defendant's motions for dismissal. This assignment of error is overruled.

[3] Defendant contends the court erred in denying his motion to set aside the verdict and motion for new trial. Defendant contends that it was error for the court to allow an inconsistent jury verdict which found his co-defendant, Terry Locklear, not guilty of kidnapping or first degree rape while the same jury found defendant guilty of second degree rape. Defendant concedes that under existing law criminal verdicts as between two or more defendants tried together need not demonstrate rational consistency. *State v. Bagnard*, 24 N.C. App. 54, 210 S.E. 2d 93 (1974), cert. denied, 286 N.C. 416, 211 S.E. 2d 796 (1975). Further, defendant contends that "[a]ll the evidence . . . would seem to indicate that if [defendant] were guilty of rape, then he would be guilty of first degree rape, because somebody was holding on to the victim." Defendant again concedes that under existing law he could be convicted of the lesser degree of the crime charged, or second degree rape, under these circumstances. N.C. Gen. Stat. § 15-170 (1983); *State v. Young*, 305 N.C. 391, 289 S.E. 2d 374 (1982). Defendant requests that "we reconsider these rules in this particular case."

We hold that *Bagnard*, G.S. § 15-170 and *Young* control the result here and that the court thus properly denied defendant's motions. Accordingly, this assignment of error is overruled.

No error.

Judges PHILLIPS and MARTIN concur.

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**State v. Hughes**

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**STATE OF NORTH CAROLINA v. DARRYL SCOTT HUGHES****No. 8615SC256****(Filed 16 September 1986)****Homicide § 28.1— self-defense—refusal to give requested instruction—error**

The trial court in a first degree murder case erred in refusing defendant's request that the jury be instructed concerning the law of self-defense where defendant presented evidence which could support a finding that he in fact believed it to be necessary to strike the victim with a baseball bat to protect himself from death or great bodily harm and that such a belief was reasonable where such evidence consisted of testimony by defendant that the victim came toward him "right fast" from out of a "pitch-black" area with a silver object which looked like a hawk-billed knife in his hand, and as he approached defendant, the heavily intoxicated victim threatened defendant.

**APPEAL** by defendant from *Farmer, Judge*. Judgment entered 16 October 1985 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 19 August 1986.

Defendant was charged in a bill of indictment with the first degree murder of Eugene Clinton Wagstaff. He entered a plea of not guilty. At trial, the State presented evidence which tended to show the following: On the evening of 14 August 1985, defendant and Lambert Nelson, Rodney Nelson, Mario Williamson, William Leath and George Robinson were drinking beer at the Rauhut Street playground. Defendant and several of the others, including Lambert Nelson and Mario Williamson, left the playground to go swimming at North Park. Their route to North Park took them past "the Jungle," a wooded area frequented by alcoholics. After climbing a fence at the park and swimming for approximately an hour, defendant and his companions left the park and walked back along Chandler Avenue, passing "the Jungle" a second time. As they passed the area, Eugene Wagstaff emerged from "the Jungle." Defendant suddenly grabbed a baseball bat out of Rodney Nelson's hands, and ran back to where Wagstaff was and hit him across the left side of the head with the baseball bat. Wagstaff grabbed his face, stumbled back and responded, "Go on, man, I ain't bothered you." Defendant then hit Wagstaff across the back, and he fell into some bushes. Lambert Nelson testified that he then told the defendant, "You shouldn't have done that, I'm going back down here to see what's wrong with him 'cause he ain't moving." The defendant replied, "Man, y'all better not go

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State v. Hughes

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back down there 'cause I'll kill him." Defendant pulled Wagstaff out of the bushes, picked him up and threw him back down on the ground. As the defendant and his friends left, the defendant kept repeating that he "don't play."

Lambert Nelson and Mario Williamson testified that they were between fifty and one hundred feet away from the defendant and Wagstaff at the time of the incident. They did not see Wagstaff make any movement toward the defendant nor did they see any weapons or objects in Wagstaff's hands.

The victim's body was discovered the next morning. The medical examiner testified that Wagstaff's death was caused by a blunt trauma to the head, a cause of death consistent with a blow from a blunt instrument. No knife or other weapon was discovered on or around Wagstaff's body.

Defendant testified in his own behalf. His testimony tended to show the following: Prior to leaving the Rauhut playground, defendant found a baseball bat. He took the bat with him to North Park; Mario Williamson also had a bat. After swimming, defendant and his companions began to walk back toward the playground. As they were passing "the Jungle," Eugene Wagstaff suddenly came out of a pitch-dark area. Williamson, Leath and the Nelsons ran, but defendant turned around to look. Wagstaff was walking "right fast" toward the defendant and holding a shiny object in his hand, which appeared to defendant to be a hawk-billed knife. Wagstaff approached the defendant saying, "Now that I've got you, ain't nowhere you can go, goddamn it." Defendant testified that he was scared for his life because he thought "he (Wagstaff) was probably—maybe he was, you know, going to do something to me," and that he struck Wagstaff once with the bat. Wagstaff fell into some weeds. When defendant rejoined his friends, someone suggested they check on Wagstaff to make sure he was alright. Defendant approached Wagstaff and said "Hey, man," to which Wagstaff grunted "Ugh" in response. Defendant grabbed Wagstaff by the biceps and the high part of his ankles, shook him, and pulled him out into a clearing. Defendant and his friends then left.

Defendant testified that he knew Wagstaff had a reputation for hanging out in "the Jungle" and staying drunk, and that Wagstaff was heavily intoxicated the night he died. He testified that

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State v. Hughes

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he did not intend to kill Wagstaff and that he hit Wagstaff because he was scared.

At the jury instructions conference, the trial judge denied defendant's requests to instruct on the law of perfect and imperfect self-defense. Defendant was found guilty of second degree murder and was sentenced to the presumptive term of fifteen years as a regular youthful offender. Defendant appeals.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Dolores O. Nesnow for the State.*

*Daniel H. Monroe for defendant appellant.*

MARTIN, Judge.

The issue dispositive of this appeal is whether the trial court erred when it refused defendant's request that the jury be instructed concerning the law of self-defense. We hold that defendant's evidence was sufficient to place the question of self-defense before the jury and that the failure of the court to instruct upon the law applicable thereto requires that defendant be granted a new trial.

Self-defense is a complete or "perfect" defense to homicide if it is established that at the time of the killing:

(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and

(2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

(3) defendant was not the aggressor in bringing on the fray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

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State v. Hughes

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*State v. Bush*, 307 N.C. 152, 158, 297 S.E. 2d 563, 568 (1982). Imperfect self-defense arises when only elements (1) and (2) are established, in which case a defendant would remain guilty of at least voluntary manslaughter. "However, both elements (1) and (2) in the preceding quotation must be shown to exist before the defendant will be entitled to the benefit of either perfect or imperfect self-defense." *Id.* at 159, 297 S.E. 2d at 568.

A defendant is entitled to an instruction on self-defense if there is any evidence in the record which establishes that it was necessary or that it reasonably appeared to the defendant to be necessary to kill in order to protect himself from death or great bodily harm. *State v. Pate*, 62 N.C. App. 137, 302 S.E. 2d 286 (1983), *aff'd*, 309 N.C. 630, 308 S.E. 2d 326 (1983). When defendant's evidence is sufficient to support an instruction on self-defense, the instruction must be given even though the State's evidence is contradictory. *State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750 (1973). However, if the court determines as a matter of law that there is no evidence in the record from which the jury could find that the defendant reasonably could have believed it to be necessary to kill to protect himself from death or great bodily harm, then the defendant is not entitled to an instruction on self-defense. *Bush*, *supra*. When judging the sufficiency of the evidence the facts must be interpreted in the light most favorable to the defendant. *State v. McCray*, 312 N.C. 519, 324 S.E. 2d 606 (1985).

In *Bush*, the Supreme Court articulated a two-question test for judging the sufficiency of the evidence to support an instruction on self-defense:

(1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable? If both queries are answered in the affirmative, then an instruction on self-defense must be given. If, however, the evidence requires a negative response to either question, a self-defense instruction should not be given.

*Bush* at 160-61, 297 S.E. 2d at 569.

In the present case, defendant presented evidence which, when viewed in the light most favorable to defendant, could sup-

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*State v. Hughes*

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port a finding that he in fact believed it to be necessary to strike Wagstaff with the bat to protect himself from death or great bodily harm. Defendant testified that Wagstaff came toward him "right fast" from out of a "pitch-black" area with a silver object that looked like a hawk-billed knife in his hand. As he approached the defendant, the heavily intoxicated Wagstaff threatened, "Now that I've got you, ain't nowhere you can go, goddamn it," and continued toward defendant. According to defendant's evidence, Wagstaff's words and actions caused him to fear for his life because he thought the object might be a knife and that Wagstaff might be going to do something to him.

Defendant's testimony, if believed by a jury, is also sufficient to support a finding that such a belief was reasonable. Defendant presented at least some evidence from which the jury could conclude that Wagstaff was in fact armed and a threat to defendant's life or health. It was for the jury, and not for the court, to determine the reasonableness of defendant's belief, under the circumstances as they appeared to him. See *State v. Johnson*, 166 N.C. 392, 81 S.E. 941 (1914).

Both *Bush* queries must therefore be answered in the affirmative and it was error for the trial court to refuse to instruct the jury on self-defense.

In view of our decision, we need not address defendant's second assignment of error. For the reasons stated, defendant is entitled to a

New trial.

Chief Judge HEDRICK and Judge PHILLIPS concur.



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**McMurray v. Surety Federal Savings & Loan Assoc.**

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JOHN H. McMURRAY, ANCILLARY ADMINISTRATOR OF THE ESTATE OF PATRICIA W. GALYON (DECEASED), AND GINNY GALYON, JEFFREY KEITH GALYON AND STEVEN WAYNE GALYON v. SURETY FEDERAL SAVINGS AND LOAN ASSOCIATION

No. 8625SC298

(Filed 16 September 1986)

**Insurance § 27.1—transfer of loan—availability of credit life insurance—no duty of lender to disclose**

A lender does not have the duty to disclose the availability of credit life insurance or the procedures for obtaining credit life insurance at the time of a loan transfer when the subject was not broached by the bank, insurance was never requested by the borrower/transferee, and there is no evidence to indicate that the borrower/transferee made any contact with the bank concerning the loan transfer process.

APPEAL by plaintiffs from *Saunders (Chase B.)*, Judge. Judgment entered 25 October 1985 in Superior Court, BURKE County. Heard in the Court of Appeals 27 August 1986.

Plaintiffs instituted this action seeking damages for defendant's negligent conduct and unfair and deceptive trade practices in connection with a 1977 loan transfer.

On 8 November 1968 Charles and Patricia Galyon purchased a home in Burke County. On 24 September 1971 in order to refinance their home, Mr. and Mrs. Galyon executed a note and deed of trust in favor of defendant in the amount of \$20,400.00. At the suggestion of defendant's loan officer, Charles Galyon made application for credit life insurance. Triad Life Insurance Corporation issued a decreasing term credit life insurance policy on the life of Charles Galyon. The premiums were paid as part of the Galyons' monthly mortgage payments.

Subsequently the Galyons separated and divorced. By deed dated 18 March 1975 Charles Galyon conveyed his interest in the marital home to Patricia Galyon. Thereafter she made the monthly mortgage payments to the defendant. In 1977 the loan was transferred in the lender's records to Patricia Galyon individually without any mention of credit life insurance. Charles Galyon was not released and remained liable on the note.

Patricia Galyon continued to make mortgage payments until her death in August 1983. Following her death, her children

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McMurray v. Surety Federal Savings & Loan Assoc.

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learned that there was no credit life insurance on their mother's life but that the policy on the life of Charles Galyon was still in effect. Through the defendant, Charles Galyon cancelled the policy on his life effective 1 April 1977. A premium refund check for the premiums paid from March 1977 until 1983 in the amount of \$1,126.18 was tendered to the estate but never cashed. The house was eventually sold by Patricia Galyon's children and the loan was paid off in March, 1984.

At the close of plaintiffs' evidence, defendant's motion for directed verdict was granted. Plaintiffs' cross-motion for directed verdict was denied. Plaintiffs appeal.

*Mitchell, Teele, Blackwell, Mitchell & Smith by Thomas G. Smith for plaintiff-appellants.*

*Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin by John W. Ervin, Jr. and Sam J. Ervin, IV, for defendant-appellee.*

EAGLES, Judge.

Plaintiffs assign error to the trial court's granting defendant's motion for a directed verdict made at the close of all the evidence. Plaintiffs contend that in a situation where one borrower has transferred the loan and underlying property securing the loan to a co-borrower the loan officer in charge of the loan transfer has a legal duty to offer credit life insurance to the transferee. We disagree.

A motion for directed verdict under G.S. 1A-1, Rule 50(a) tests the legal sufficiency of the evidence to take the case to the jury. *Everhart v. LeBrun*, 52 N.C. App. 139, 277 S.E. 2d 816 (1981). In ruling on a defendant's motion for directed verdict, the trial court must take plaintiff's evidence as true, considering plaintiff's evidence in the light most favorable to him and giving him the benefit of every reasonable inference. *Id.* Defendant's motion for a directed verdict should be denied "unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." *Graham v. Gas Co.*, 231 N.C. 680, 683, 58 S.E. 2d 757, 760 (1950). Given these principles it is clear that a defendant in a negligence action is not entitled to a directed verdict unless the plaintiff has failed, as a matter of law, to establish the elements of actionable negligence. *Everhart v. LeBrun*, *supra*.

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**McMurray v. Surety Federal Savings & Loan Assoc.**

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Negligence has been defined as the failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them. *Stanford v. Owens*, 46 N.C. App. 388, 265 S.E. 2d 617, *disc. rev. denied*, 301 N.C. 95 (1980). The traditional elements of actionable negligence are the existence of a legal duty or obligation, breach of that duty, proximate cause and actual loss or damage. W. Keeton, Prosser and Keeton on Torts, Section 30 (5th ed. 1984).

Plaintiffs contend that a legal duty existed at the time of the loan transfer that required the defendant to inform Patricia Galyon about credit life insurance. Plaintiffs contend that this legal duty arose out of a fiduciary relationship that existed between Galyon as borrower and defendant as lender. However, plaintiffs' evidence failed to prove the existence of any fiduciary relationship. A fiduciary relationship exists "where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). The relationship extends to instances where "there is confidence reposed on one side, and resulting domination and influence on the other." *Id.*

There is no evidence that Patricia Galyon reposed a special confidence in Surety Federal in connection with the loan transfer. Plaintiffs' evidence shows that on 18 March 1975 Charles Galyon by deed conveyed his interest in the marital home to Patricia Galyon. Following the divorce in 1975, Patricia Galyon made all the mortgage payments to defendant which included insurance premium payments on the life of Charles Galyon. In 1977 Surety Federal contacted Mr. and Mrs. Galyon concerning delinquent mortgage payments. Prior to this time Surety Federal had never received any information about the Galyons' divorce and the resulting conveyance from Charles to Patricia. Mr. Galyon requested that the defendant "transfer the deed to Pat's name," and a copy of the 1975 deed from Charles to Patricia was forwarded to the defendant. On 22 March 1977 Charles T. Henson, vice president and secretary of Surety Federal, wrote a letter to Patricia Galyon informing her that the loan account had been changed to her name individually in accordance with the deed and that all future correspondence would be directed to her.

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**McMurray v. Surety Federal Savings & Loan Assoc.**

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Plaintiffs rely on *Stone v. Davis*, 66 Ohio St. 2d 74, 419 N.E. 2d 1094, *cert. denied*, 454 U.S. 1081, 70 L.Ed. 2d 614, 102 S.Ct. 634 (1981), in which the Supreme Court of Ohio held that "in broaching the subject of mortgage insurance to a loan customer, a lending institution has a duty to advise the customer as to how this insurance may be procured." *Id.* at 80, 419 N.E. 2d at 1099. This holding is based on the Ohio court's finding that when a bank "broaches" the subject of mortgage insurance to a loan customer "the bank acts as its customer's fiduciary and is under a duty to fairly disclose to the customer the mechanics of procuring such insurance." *Id.* at 78, 419 N.E. 2d at 1098. Though the Ohio Supreme Court's analysis of the facts before it in *Stone* is persuasive, the facts here are different. The *Stone* decision rests primarily on the fact that the bank "broached" the subject of mortgage insurance and by doing so acted as the borrower's fiduciary under a duty to disclose how to procure the insurance. Here, Surety Federal never "broached" the subject of credit life insurance with Patricia Galyon at the time of the loan transfer. In fact, there is no evidence of any contact between Patricia Galyon and Surety Federal at the time the loan was transferred except for a letter from Mr. Henson to Mrs. Galyon informing her after the fact that the loan had been transferred to her name individually. There is no evidence that Patricia Galyon requested credit life insurance. Charles Galyon remained liable on the note and deed of trust. He never requested that the insurance on his life be cancelled. We do not agree with plaintiffs' argument that because defendant "broached" the subject of credit life insurance six years earlier in connection with the original loan, it was under a legal duty to do so again at the time of the loan transfer.

Plaintiffs make much of the existence of defendant's internal memorandum, a "Loan Transfer Checklist," which includes among the items to be checked in the loan transfer process the listing "Life Insurance." Plaintiffs contend that because "Life Insurance" appeared on the checklist defendant was under the legal duty to inform Patricia Galyon as to the availability of credit life insurance. We do not believe that the existence of a provision for life insurance on defendant's internal checklist memorandum gives rise to a legal duty to provide such information, especially when the subject has not been broached by the bank or inquired about by the borrower/transferee.

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**State v. Roberts**

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In this case of first impression we decline to impose on a lender the duty to disclose the availability of credit life insurance or the procedures for obtaining credit life insurance at the time of a loan transfer when the subject was not "broached" by the bank, insurance was never requested by the borrower/transferee and there is no evidence to indicate that the borrower/transferee made any contact with the bank concerning the loan transfer process. Accordingly, we affirm the trial court's directed verdict for defendant.

Plaintiffs also assign error to the exclusion of Steven Galyon's testimony about when he and his mother learned she had cancer. Since we have affirmed the trial court's granting of defendant's motion for directed verdict on the ground that plaintiffs' evidence failed to prove the existence of a legal duty, we need not address assignments of error relating to other issues.

**Affirmed.**

**Judges ARNOLD and PARKER concur.**

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STATE OF NORTH CAROLINA v. PHILLIP S. ROBERTS

No. 8624SC361

(Filed 16 September 1986)

**1. Searches and Seizures § 18— driver properly stopped for traffic violation— consent to search vehicle—items properly admitted**

Items and tools taken from the car which defendant was driving were properly admitted into evidence where defendant failed to dim his lights as he drove toward a deputy sheriff; the officer turned around, followed defendant, and noticed that he was driving in an erratic manner; this traffic violation in the officer's presence justified stopping defendant, requesting a routine driver's license check, and ordering defendant to exit from the vehicle; as a result of the license check, the deputy was notified that defendant was suspected of possessing an automatic weapon; after performing a proper frisk search on defendant, the deputy requested and received permission to search the vehicle from both defendant as operator and his codefendant as owner; and it was pursuant to this consensual search that the deputy discovered the items and tools.

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**State v. Roberts**

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**2. Burglary and Unlawful Breakings § 10.2— possession of housebreaking tools— driver but not owner of car in which tools found—admissibility of evidence**

In a prosecution of defendant for felonious possession of implements of housebreaking, there was no merit to defendant's contention that the trial court should have granted his motions to dismiss because he was operating a vehicle when implements were found therein, but he was not the owner and thus was not chargeable with knowledge of the presence of the items and tools.

**3. Constitutional Law § 72; Criminal Law § 74.2— codefendant's confession—co-defendant's refusal to testify—admission of confession improper**

The trial court erred in allowing the State to introduce a statement from an unavailable codefendant which implicated defendant because the statement was violative of the hearsay rule and of defendant's right of confrontation, since the codefendant asserted his Fifth Amendment privilege against self-incrimination and was thus unavailable for cross-examination; the purported confession was never reduced to writing, a factor weighing heavily against its reliability; and there was the danger that the codefendant in confessing had a motive to lessen the appearance of his own guilt by spreading the blame.

APPEAL by defendant from *Pachnowski, Judge*. Judgment entered 4 December 1985 in AVERY County Superior Court. Heard in the Court of Appeals 29 August 1986.

Defendant was indicted for felonious possession of implements of housebreaking in violation of N.C. Gen. Stat. § 14-55. The State's evidence tended to show, in pertinent part, that:

On 11 April 1985 around 11:50 p.m., Deputy Sheriff Warren of the Avery County Sheriff's Department was patrolling Highway 194 in Newland. Defendant was driving a car in the opposite direction down Highway 194. When the two cars approached and passed each other, defendant "failed to dim his lights." Deputy Warren turned around and followed defendant for "approximately a half mile or three-quarters of a mile." Defendant "hit the yellow line a couple of times" and then Deputy Warren stopped him.

Deputy Warren made a routine driver's license check and learned that defendant was suspected of possessing an automatic weapon. Deputy Warren then ordered defendant and his companion to exit the car and performed a frisk search on both of them. After performing the frisk searches, Deputy Warren told them that they were suspected of possessing an automatic weapon and that he needed to search their car. Both men consented to a search of the car. Pursuant to this search, Deputy Warren discovered various housebreaking implements in the car.

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State v. Roberts

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At trial, the State called Jimmy Dale Laney, codefendant of defendant, to testify. After being duly sworn, Laney refused to answer questions on direct examination, exercising his right not to testify under the Fifth Amendment of the United States Constitution. The court then excused Laney from further testimony. The State then introduced, and the court admitted into evidence through the testimony of Detective B. R. Baker, an alleged oral statement by Laney to Detective Baker made during an interview which implicated defendant. Specifically, Detective Baker testified that Laney

told me that he got up with [defendant] on April the 11th in Tennessee. He told me that [defendant] was standing near the car at that time talking to, to some other person, I don't recall who he said. That he, Mr. Laney, during the time that [defendant] was standing there talking to someone else, that Mr. Laney put the tools in the car in various places in the car, and that he Mr. Laney, and [defendant] came to North Carolina looking for a place to break into.

Defendant was convicted of felonious possession of implements of housebreaking in violation of N.C. Gen. Stat. § 14-55. He appeals from a judgment of imprisonment.

*Attorney General Lacy H. Thornburg, by Associate Attorney General J. Charles Waldrup, for the State.*

*C. Gary Triggs for defendant appellant.*

WELLS, Judge.

[1] Defendant contends that various items and tools should not have been admitted into evidence because the officer had no probable cause to stop the vehicle he was operating and there were no exigent circumstances which justified a warrantless search. However, the State's evidence showed that defendant, as operator of an oncoming vehicle, failed to dim his lights in violation of N.C. Gen. Stat. § 20-181 as he drove toward a deputy sheriff. The deputy turned around and followed defendant, noticed that defendant was driving in an erratic manner, and therefore stopped him. This traffic violation in the officer's presence justified stopping the defendant, requesting a routine driver's license check, and ordering defendant to exit from the vehicle. *See Penn-*

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**State v. Roberts**

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*sylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed. 2d 331 (1977). As a result of the license check, the deputy was notified that defendant was suspected of possessing an automatic weapon. After performing a frisk search on defendant as authorized by *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968), the deputy requested and received permission to search the vehicle from both defendant, as operator, and his codefendant, as owner. It was pursuant to this consensual search that the deputy discovered the items and tools. When a person consents to a search by law enforcement officers, this consent dispenses with necessity for a search warrant. *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968). Accordingly, the items and tools were seized in a constitutionally valid manner and were properly admitted into evidence.

[2] Defendant contends the court erred in denying his motions to dismiss because the State failed to show that he knew or reasonably should have known of the presence of the implements of housebreaking in and about the car. He admits that he was operating the vehicle when it was stopped, but asserts he was not the owner and thus was not chargeable with knowledge of the presence of these items and tools.

This contention has been resolved against defendant in *State v. Glaze*, 24 N.C. App. 60, 210 S.E. 2d 124 (1974). We hold that the evidence was sufficient to take the case to the jury.

[3] Finally, defendant contends that the Court erred in allowing the State to introduce into evidence a statement from codefendant Laney, which implicated him, because such statement was violative of the hearsay rule and of his right of confrontation. We agree.

In a recent case, *Lee v. Illinois*, 476 U.S. ---, 106 S.Ct. 2056, 90 L.Ed. 2d 514 (1986), the United States Supreme Court held that the trial court's reliance on a codefendant's uncross-examined confession in finding defendant guilty violated her Sixth Amendment right of confrontation where the confession was not shown to be independently reliable. There, counsel for the State of Illinois contended that defendant Lee's Sixth Amendment right of confrontation had not been violated because her codefendant was unavailable and his statement was "reliable" enough to warrant its untested admission. 476 U.S. at ---, 90 L.Ed. 2d at 525, 106



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State v. Roberts

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S.Ct. at 2061. Counsel for the State in *Lee* apparently categorized codefendant's hearsay confession as a declaration against penal interest. 476 U.S. at ---, n. 5, 90 L.Ed. 2d at 528, n. 5, 106 S.Ct. at 2064, n. 5. The Supreme Court rejected Illinois' argument, however, finding that the State had failed to produce "sufficient 'indicia of reliability,' flowing from . . . the circumstances surrounding the confession . . . to overcome the weighty presumption against the admission of such uncross-examined evidence." 476 U.S. at ---, 90 L.Ed. 2d at 530, 106 S.Ct. at 2065.

The facts in the case at hand are quite similar. Here the State sought to introduce codefendant Laney's confession against defendant Roberts as a declaration against penal interest claiming that Laney was unavailable because he had asserted his Fifth Amendment privilege against self-incrimination. N.C. Gen. Stat. § 8C, Rule 804 (Supp. 1981). Laney's assertion of the Fifth Amendment, however, would have also made futile any attempt by defendant to cross-examine him.

Although Detective Baker's rendition of Laney's confession would have explained the presence of housebreaking implements in and about the car defendant was operating, such a correlation does not necessarily make this hearsay confession inherently reliable. Moreover, the purported confession was never reduced to writing, a factor weighing heavily against the statement's reliability. There is the ever-present danger that Laney, in confessing, had a motive "to mitigate the appearance of his own culpability by spreading the blame. . . ." *Lee*, 476 U.S. at ---, 90 L.Ed. 2d at 528, 106 S.Ct. at 2064. These reliability factors simply cannot be tested where, as here, the codefendant making the purported confession cannot be cross-examined.

Accordingly, we find that defendant was denied his Sixth Amendment right of confrontation. Because admission of Laney's confession cannot be deemed harmless beyond a reasonable doubt, we remand this case for a new trial. N.C. Gen. Stat. §§ 15A-1442 (5)(a) and 1443.

New trial.

Judges JOHNSON and MARTIN concur.

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**Draughon v. Draughon**

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E. D. ELDRANGE DRAUGHON v. LOUISE BILL DRAUGHON

No. 8612DC228

(Filed 16 September 1986)

**1. Divorce and Alimony § 30— equitable distribution— wife's inheritance used to pay mortgage—gift—no separate property**

The trial court did not err in determining that a sum of nearly \$9,000 inherited by defendant from her mother and used to help pay the mortgage on the family residence held as tenants by the entirety was not separate property but constituted a gift to the marital estate, notwithstanding defendant testified that she never intended the mortgage payment to constitute a gift to her husband or to the marital estate.

**2. Divorce and Alimony § 30— equitable distribution—sole proprietorship of husband—valuation by court improper**

In a hearing to determine distribution of marital property, the trial court improperly valued plaintiff's business, a landscaping business which was a sole proprietorship, by determining that the net value of the business equaled the net value of the business's tangible assets without giving any consideration to the goodwill of the business.

**3. Divorce and Alimony § 30— equitable distribution—husband's tools—valuation by court improper**

In a hearing to determine distribution of marital property, the net value placed by the trial court on plaintiff's tools was unsupported by the evidence, and the court erred in failing to determine whether a house and lot was marital property or separate property.

APPEAL by defendant from *Hair, Judge*. Order entered 27 November 1985 in District Court, CUMBERLAND County. Heard in the Court of Appeals 26 August 1986.

Plaintiff instituted this action seeking an absolute divorce and an equitable distribution of the marital property. Judgment of divorce was entered on 3 June 1985. Upon hearing on the matter of the distribution of the marital property, the trial court ordered an equal distribution of the marital property. From the judgment of the trial court concerning the property distribution, defendant appeals.

*Blackwell, Swaringen & Russ, by John Blackwell, Jr. and Margaret R. Russ, for plaintiff appellee.*

*Harris, Sweeny & Mitchell, by Ronnie M. Mitchell, for defendant appellant.*

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**Draughon v. Draughon**

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ARNOLD, Judge.

[1] Defendant contends that the trial court erred in not classifying certain money as separate property pursuant to G.S. 50-20(a) and (b). She submits that the court should have found that during the marriage, she acquired separate property in the sum of \$8,983.37 from her mother which was used to help pay the mortgage on the family residence held as tenants by the entirety, but that the sum remained separate property. We do not agree.

Under the Equitable Distribution Act, separate property includes all real and personal property acquired by a spouse by bequest, devise, descent, or gift during marriage and this property remains separate property when exchanged for other property "regardless of whether the title is in the name of the husband or wife or both unless a contrary intention is expressly stated in the conveyance." G.S. 50-20(b)(2). In *McLeod v. McLeod*, 74 N.C. App. 144, 156, 327 S.E. 2d 910, 918, *cert. denied*, 314 N.C. 331, 333 S.E. 2d 488 (1985), this Court in construing G.S. 50-20(b)(2) held that "[w]hen property titled by the entireties is acquired in exchange for separate property the conveyance itself indicates the 'contrary intention' to preserving separate property required by the statute." Moreover, the Court stated that "where a spouse furnishing consideration from separate property causes property to be conveyed to the other spouse in the form of tenancy by the entireties, a presumption of a gift of separate property to the marital estate arises, which is rebuttable by clear, cogent, and convincing evidence." *Id.* 74 N.C. App. at 154, 327 S.E. 2d at 916-17.

In the present case, the trial court concluded that the \$8,983.37 became marital property upon its use to pay the mortgage. Defendant contends that the use of this sum to pay the mortgage is distinct from buying a residence, and that since *McLeod* concerned the purchase of a home, that case is not controlling here. We disagree. Defendant also notes that she testified she never intended the mortgage payment to constitute a gift of her inheritance to her husband or the marital estate. She contends this testimony was sufficient to rebut the presumption of a gift of separate property to the marital estate by clear, cogent, and convincing evidence. This evidence may be clear and cogent, but evidently it was not convincing to the trial court. The credi-

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**Draughon v. Draughon**

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bility of a witness is a matter to be resolved by the trier of fact. *Laughter v. Lambert*, 11 N.C. App. 133, 180 S.E. 2d 450 (1971). Upon appellate review of a case heard without a jury the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though evidence might sustain findings to the contrary. *Dixon v. Kinser and Kinser v. Dixon*, 54 N.C. App. 94, 282 S.E. 2d 529 (1981), *disc. rev. denied*, 304 N.C. 725, 288 S.E. 2d 805 (1982). We have reviewed the evidence and find that it supports the court's findings. The court properly concluded, based upon the case law, that defendant's sum was a gift to the marital estate in the form of a mortgage payment.

[2] Defendant also contends that the trial court erred in failing to place a net value upon plaintiff's business in its valuation of the marital property as required by G.S. 50-20(c). The trial court made the following findings of fact concerning plaintiff's business:

IX. That the Court received into evidence testimony concerning the valuations of the landscaping business owned and operated by the plaintiff. The business is a sole proprietorship and was started about 2 years ago. The plaintiff owns certain tangible equipment used in the business, to wit: a 1979 Massey Ferguson tractor, a Super Pan, a York Rake, a Drag Blade, a 1972  $\frac{3}{4}$  ton dump truck, a 1977 Ford Van, a 1967 Fairlane 500 Ranchero, and hand tools. This equipment has a net value, as established by the Court, as shown on the attached Exhibit "A," adopted herein by reference. B. D. Landscaping is operated by the plaintiff who performs the labor, employs additional part time labor, and is solely responsible for the direction and success of the business. B. D. Landscaping has a handful of customers for whom it landscapes yards mainly for new houses. Aside from the personal labor and management of the plaintiff, the Court is unable to designate any value to "Good Will" of the business and as a result, the Court is unable to place a value on the business except for the tools and equipment owned by plaintiff and used in his business.

The trial court did establish a net value for the business equal to the net value of the tangible assets of that business. Therefore, defendant is correct in asserting that the court improperly valued the business.

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Draughon v. Draughon

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This Court addressed the issue of the proper valuation of a solely owned professional practice in *Poore v. Poore*, 75 N.C. App. 414, 331 S.E. 2d 266, *disc. rev. denied*, 314 N.C. 543, 335 S.E. 2d 316 (1985). Though that case concerned a dental practice, the valuation methods discussed and approved in that opinion are applicable to the present issue of the proper valuation of a solely owned business. See J. McCahey, *Valuation and Distribution of Marital Property*, Sec. 22.08 (1985).

We first note that the task of a reviewing court on appeal is to determine whether the approach used by the trial court reasonably approximated the net value of the business interest. *Poore*, 75 N.C. App. at 419, 331 S.E. 2d at 270. If it does, the valuation will not be disturbed. *Id.* In *Poore*, we stated that

In ordering a distribution of marital property, a court should make specific findings regarding the value of a spouse's professional practice and the existence and value of its goodwill, and should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied. On appeal, if it appears that the trial court reasonably approximated the net value of the practice and its goodwill, if any, based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed.

75 N.C. App. at 422, 331 S.E. 2d at 272.

In the present case, defendant's evidence tends to show that plaintiff's business had goodwill and that the value of the business, including its goodwill, was \$61,500.00. This valuation was prepared by an accounting firm using a capitalization of earnings method. Plaintiff's evidence as to the value of his business consisted of his testimony regarding the history of the business and the condition and value of the tangible assets at the date of separation. From this evidence the trial court concluded that the net value of the business equaled the net value of the business's tangible assets. However, we are unable to determine from the court's findings what method it used in determining that the business had no goodwill and whether their determination was based on a sound method of valuation. We must remand this cause for further findings as to the value of plaintiff's business.

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**Draughon v. Draughon**

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[3] Defendant further contends that the trial court erred in failing to place a net value on plaintiff's tools and on plaintiff's life interest in real property, thereby failing to make an equitable distribution of the marital property. We find it necessary to also remand these issues for further findings.

The trial court did place a net value of \$1,000.00 on plaintiff's tools. Defendant again apparently asserts that the court's findings were improper and not supported by the evidence. We agree. Defendant testified that plaintiff's tools were worth \$8,295.00. Plaintiff testified that his tools in his possession were worth between \$1,200.00 and \$1,500.00 and that tools in his wife's possession were worth between \$500.00 and \$600.00. The court's finding that the net value of the tools was \$1,000.00 is not supported by the evidence and was error.

Plaintiff testified on cross-examination that he owned a life estate interest in a house and lot, and that the fair market rental value of the house was \$250.00 per month. Evidence indicated that plaintiff's son owns the property in fee and has been receiving the rents from the property in the sum of \$150.00 per month. The trial court failed to determine whether the life estate was marital property or separate property. This failure to make such a determination was error. G.S. 50-20(b).

For the reasons set forth above, we vacate the order for equitable distribution of the marital property, and we remand this cause for further proceedings not inconsistent with this opinion.

Vacated and remanded.

Judges WELLS and EAGLES concur.

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**Peterson v. Finger**

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EDWIN PETERSON AND ARTIE LEE PETERSON, BY HER GUARDIAN, JOSEPH HIGGINS v. JAMES OLEN HIGGINS FINGER

No. 8624SC178

(Filed 16 September 1986)

**Evidence § 11; Cancellation and Rescission of Instruments § 1— setting aside deed for fraud and mental incompetence—communications between grantee and lunatic grantor—admissibility of evidence**

In an action to set aside a deed on the grounds of fraud and mental incompetence of the grantor, the trial court did not err in permitting defendant to testify as to certain conversations she had with plaintiff grantor before the contested deed was executed, since (1) an interested person is not prevented from testifying to an oral communication with a lunatic when the guardian testifies in his own behalf regarding the subject matter or oral communication, or when evidence of the subject matter of the oral communication is offered by the guardian, and the record here showed that the guardian, a witness for his ward and the other plaintiff, testified that his ward when competent told him the very same thing defendant testified to; (2) even if receiving the evidence was error it was not prejudicial, as substantially the same evidence was received without objection from the attorney who prepared the disputed deed; and (3) an interested party may testify to oral communications with a lunatic when the lunatic's mental capacity is in issue, the interested party expresses an opinion thereon, and the basis for the opinion includes the communications and personal transaction testified to. N.C.G.S. § 8C-1, Rule 601(c).

APPEAL by plaintiffs from *Pachnowski, Judge*. Judgment entered 30 September 1985 in Superior Court, YANCEY County. Heard in the Court of Appeals 6 June 1986.

Plaintiffs—who are respectively the stepfather and the mother of the defendant—sued to set aside a deed they gave her in August 1983. The land involved, a half acre upon which is situated a house and two rental apartments, was the sole property of the female plaintiff before her marriage to the male plaintiff. In 1972 the remainder, subject to plaintiffs' life estate, was deeded to defendant; the August 1983 deed conveyed the life estate as well. The grounds alleged for setting the latter deed aside were constructive fraud—based on the relationship of the parties, the advanced age of the plaintiffs, and defendant's alleged failure to inform them as to the deed's contents—and the mental incompetence of plaintiff Artie Lee Peterson. A year after the transaction complained of plaintiff Artie Lee Peterson was adjudged to be mentally incompetent and her son Joseph Higgins, defendant's brother, was appointed guardian. At the same time in

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*Peterson v. Finger*

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1972 that plaintiffs deeded defendant the remainder of the property involved, they also deeded an adjacent lot to Higgins in fee simple. At trial the jury found that (1) the feme plaintiff was not mentally incompetent when the deed was executed; (2) a relationship of trust and confidence existed between the parties; and (3) the transaction between them was open, fair and honest. Judgment for the defendant was entered on the verdict.

*Staunton Norris for plaintiff appellants.*

*Watson and Hunt, by Charlie A. Hunt, Jr., for defendant appellee.*

PHILLIPS, Judge.

Plaintiff appellants make only two contentions, the first being that the trial judge erred in permitting the defendant to testify over their objections as to certain conversations that she had with plaintiff Artie Lee Peterson before the contested deed was executed. The objections were based on Rule 601(c), N.C. Evidence Code, which recodified the so-called "Dead Man's Statute," G.S. 8-51, and the fact that defendant's claim is adverse to that of the plaintiff Artie Lee Peterson, an adjudged lunatic. The testimony objected to was to the effect that on several different occasions before the August 1983 deed was executed Artie Lee Peterson told her that since the deed given her brother contained no restriction the plaintiffs were going to make things equal between the two by deeding her the life estate in the lot. Under the record in this case the testimony was not barred by the Dead Man's Statute for three reasons. First, the rule plaintiffs rely upon expressly provides that an interested person is not prevented from testifying to an oral communication with a decedent or lunatic when the executor, administrator, or guardian testifies in his own behalf regarding the subject matter of the oral communication, or when evidence of the subject matter of the oral communication is offered by the executor, administrator or guardian, Rule 601(c)(1)(3), and the record shows that the guardian, Joseph Higgins, a witness for his ward and the other plaintiff, testified that his ward when competent told him the very same thing defendant testified to: that plaintiffs were going to treat defendant equally with him by deeding her the life estate. Second, even if receiving the evidence was error it was not prejudicial, as



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**Peterson v. Finger**

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substantially the same evidence was received without objection from the attorney who prepared the disputed deed. 1 Strong's N.C. Index 3d, *Appeal and Error* Sec. 48.1 (1976). And third, our law permits an interested party to testify to oral communications with a decedent or lunatic when, as here, the decedent's or lunatic's mental capacity is in issue, the interested party expresses an opinion thereon, and the basis for the opinion includes the communications and personal transactions testified to. *Whitley v. Redden*, 276 N.C. 263, 171 S.E. 2d 894 (1970); *Bissett v. Bailey*, 176 N.C. 43, 96 S.E. 648 (1918). In this case defendant's opinion was partially based upon the conversations referred to, which tended to show that Artie Lee Peterson thought logically, understood what she was about, and was able to act upon her thoughts. That the testimony also tended to show the grantor's intention or state of mind did not make it inadmissible for its proper purpose, though plaintiffs could have had the evidence limited to that purpose if they had so requested. *In re Will of Ricks*, 292 N.C. 28, 231 S.E. 2d 856 (1977).

Plaintiffs' other contention is that the court erred in permitting the lay witness, Jack Finger, to testify that in his opinion Artie Lee Peterson was mentally competent on 11 August 1983 because he did not testify that he saw her on that date. *In re Will of Cromartie*, 64 N.C. App. 115, 306 S.E. 2d 853 (1983). But the witness testified that he saw her often and saw her "on or about" the date stated, which was foundation enough for the opinion.

No error.

Judges MARTIN and PARKER concur.

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**East Carolina Oil Transport v. Petroleum Fuel & Terminal Co.**

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**EAST CAROLINA OIL TRANSPORT, INC. v. PETROLEUM FUEL AND TERMINAL COMPANY, DOING BUSINESS AS APEX OIL COMPANY AND APEX OIL COMPANY**

No. 8614SC274

(Filed 16 September 1986)

**1. Judgments § 1— body of judgment controlling over heading—summary judgment entered**

Since the wording of the body of a judgment controls and not the heading, the trial court in this case entered summary judgment, and there was therefore no merit to plaintiff's contention that the trial court erred in granting default judgment for defendant.

**2. Rules of Civil Procedure § 56— counterclaim not answered—summary judgment proper**

The trial court did not err in granting summary judgment for defendant where plaintiff did not file answer to defendant's counterclaim within the time allowed by law; defendant filed a motion for summary judgment and a motion for entry of default on the same day; the entry of default established certain items as proven facts; and the court also considered interrogatories and answers, requests for admissions and responses, and requests for production of documents and replies.

**3. Rules of Civil Procedure § 60— motion for relief from judgment—no showing of excusable neglect**

The trial court did not err in refusing to consider plaintiff's motion for relief from judgment where plaintiff's counsel admitted that he requested important information from plaintiff but plaintiff did not produce the information until well after the time for filing a response to the counterclaim and after the hearing on summary judgment, and plaintiff thus showed no excusable neglect which would entitle him to relief. N.C.G.S. § 1A-1, Rule 60(b)(1).

APPEAL by plaintiff from *Brannon, Judge*, and *Bowen (Wiley F.)*, *Judge*. Judgment entered 26 September 1985 and order entered 11 December 1985 in Superior Court, DURHAM County. Heard in the Court of Appeals 26 August 1986.

On 25 October 1984, plaintiff instituted this action to recover sums owed to plaintiff by defendant for transporting oil. Defendant filed both an answer and a counterclaim on 31 December 1984. Defendant admitted liability on the plaintiff's claim of \$7,820.00 and sought an offset for the amount of \$38,421.02 which defendant alleged was owed to him by plaintiff. Plaintiff never filed a reply to the counterclaim. On 10 September 1985, defendant filed and served a motion for summary judgment which set the hearing for

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East Carolina Oil Transport v. Petroleum Fuel & Terminal Co.

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23 September 1985. That same day defendant obtained an entry of default against plaintiff on defendant's counterclaim.

On 26 September 1985, the trial court granted summary judgment for plaintiff on the original claim. The trial court also granted judgment in favor of defendant on its counterclaim. The heading atop the judgment read "SUMMARY JUDGMENT AND DEFAULT JUDGMENT" while the body of the judgment stated that the matter was before the court based on defendant's motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

Plaintiff gave notice of appeal in open court but later filed a motion to set aside the entry of default and what plaintiff referred to as the default judgment. On 11 December 1985, the court declined to exercise jurisdiction over this motion. Plaintiff has also filed a motion for relief from judgment with this Court pursuant to G.S. 1A-1 and Rule 60(b). From the judgment and order above, plaintiff appeals.

*Eugene C. Brooks, III and Bailey, Dixon, Wooten, McDonald, Fountain & Walker, by Gary Parsons, for plaintiff appellant.*

*Randall, Yaeger, Woodson, Jervis & Stout, by John C. Randall, for defendant appellee.*

ARNOLD, Judge.

[1] Plaintiff contends that the trial court erred in granting default judgment for defendant. The judgment entered against plaintiff does in fact state in its heading that it is a summary judgment and a default judgment. However, the wording within the body of the judgment itself only speaks in terms of a summary judgment and makes no mention of a default judgment. When it is unclear from looking at the judgment whether a default judgment or a summary judgment was intended, the wording of the body of the judgment itself controls, not the heading. The judgment entered in the case *sub judice* was a summary judgment. Thus we need not consider plaintiff's first contention.

[2] Next plaintiff argues that the trial court erred in granting summary judgment for defendant. We disagree. Thirty days after service of defendant's counterclaim, plaintiff had not responded with an answer or other pleading of any nature. Time allowed by

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East Carolina Oil Transport v. Petroleum Fuel & Terminal Co.

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law for the plaintiff to answer had expired. As a result, the entry of default established certain items as proven facts. *See Bell v. Martin*, 299 N.C. 715, 264 S.E. 2d 101, *reh'g denied*, 300 N.C. 380 (1980); *First Union National Bank v. Wilson*, 60 N.C. App. 781, 300 S.E. 2d 19 (1983). It was established that defendant Apex Oil Company sold petroleum to plaintiff in the amount totalling \$38,421.02 and that defendant had demanded payment from plaintiff and was refused. In addition to these facts, the court considered interrogatories and answers, requests for admission and responses, and requests for production of documents and replies. While defendant's motives in filing both a motion for summary judgment and a motion for entry of default on the same day may be questioned, no rules were violated. The trial court properly granted summary judgment in favor of defendant on its counterclaim.

[3] Finally, plaintiff argues that the trial court erred in refusing to consider its motion for relief from judgment. Plaintiff contends that this Court should either vacate the trial court's order refusing to consider plaintiff's motion or, in the alternative, grant plaintiff's motion for relief from judgment filed with this Court.

In order for one to be entitled to relief under Rule 60(b) a party must show excusable neglect and a meritorious defense. *In the Matter of Oxford Plastics v. Goodson, Jr.*, 74 N.C. App. 256, 328 S.E. 2d 7 (1985). It also is well-established that a party served with a summons must give the matter the attention that a person of ordinary prudence would give to his important business. Failure to do so is not excusable neglect under G.S. 1A-1, Rule 60(b)(1). *Ellison v. White*, 3 N.C. App. 235, 164 S.E. 2d 511 (1968); *Meir v. Walton*, 2 N.C. App. 578, 163 S.E. 2d 403 (1968).

In the present case the facts show no excusable neglect on the part of the plaintiff. By affidavit and oral argument before this Court, plaintiff's counsel admitted that important information was requested from plaintiff by plaintiff's counsel. Plaintiff did not produce the information until well after the time for filing a response to the counterclaim and after the hearing on summary judgment. This was not prudent behavior. We hold that plaintiff has shown no excusable neglect and is not entitled to relief under G.S. 1A-1, Rule 60(b)(1).

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**State v. Humphries**

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Affirmed.

Judges PHILLIPS and MARTIN concur.

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STATE OF NORTH CAROLINA v. TRACY DEMONT HUMPHRIES AND JAMES  
EDWARD JAMISON

No. 8618SC218

(Filed 16 September 1986)

**Burglary and Unlawful Breakings § 5— second degree burglary—intent to commit  
felony—insufficiency of evidence**

Evidence was insufficient to sustain a verdict of second degree burglary where it tended to show that one defendant tampered with a screen of an apartment and then entered through a window; officers ordered him to come out, which he did; the other defendant was found asleep in a car in the parking lot; each defendant indicated that he believed the apartment to be the dwelling of the other's girlfriend; each defendant indicated that he believed the other defendant had permission to enter the apartment; according to the owner, nothing in the apartment had been disturbed; and the inference of intent to steal was thus rebutted. However, there was evidence from which the jury could have found defendants guilty of misdemeanor breaking or entering, and the case must therefore be remanded for sentencing on the lesser-included offense.

APPEAL by defendants from *Seay, Judge*. Judgments entered 3 October 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 26 August 1986.

Defendants were charged in proper bills of indictment with second degree burglary in violation of G.S. 14-51. The indictments charged that defendants did break and enter the dwelling of Dr. Ronald Roberts with the intent to commit larceny therein. Their cases were consolidated for trial.

The State presented evidence which tended to show the following facts. On 17 August 1984, at approximately midnight, Lisa Lumpford observed two black males standing by a window of an apartment across the street from her apartment. She observed them tamper with the screen and saw one man enter the apartment through the window. The other man went to a parked car, drove away, but then returned to the parking lot. As she was

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**State v. Humphries**

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observing these activities, she telephoned police and described the events.

After the police arrived, they commanded Jamison who had been inside the apartment for at least 15 minutes to step outside, and they arrested him. Ms. Lumpford testified that Jamison's reaction was to gesture in such a way as to indicate that he had a right to be in the apartment. Jamison immediately explained to the police that Humphries had invited him into the apartment which he believed to have been occupied by Humphries' girlfriend. After arresting Jamison and receiving instructions from the dispatcher who had remained in contact with Ms. Lumpford, the police found Humphries apparently asleep in a car in the parking lot. Humphries was arrested.

Defendant Humphries presented evidence that he thought Jamison had gone to Jamison's girlfriend's house to get some money and that he believed Jamison had permission to enter the apartment. Humphries also testified that Jamison promised to compensate him for driving Jamison to get the money.

At trial, Dr. Roberts testified that nothing had been disturbed inside his apartment.

Both defendants were convicted of second degree burglary. From judgments imposing 14-year terms of imprisonment, defendants appeal.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Steven F. Bryant, for the State.*

*Assistant Public Defender Charles L. White for defendant Jamison.*

*Smith, Patterson, Follin, Curtis, James & Harkavy, by Charles A. Lloyd, for defendant Humphries.*

ARNOLD, Judge.

Defendants contend that there was insufficient evidence to support their convictions for second degree burglary. We agree.

In order to support a conviction for second degree burglary, there must be evidence from which a jury could find that defendants broke and entered a dwelling house at nighttime, with the in-

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**State v. Humphries**

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tent to commit a felony therein. See *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976). The intended felony alleged in defendants' indictments was larceny. The State must have presented evidence sufficient for the jury to find that, at the time defendants entered the residence, they intended to take and carry away the personal property of another without consent and with the intent to permanently deprive the owner of that property. G.S. 14-72.

In *State v. McBryde*, 97 N.C. 393, 1 S.E. 925 (1887), the North Carolina Supreme Court stated:

The intelligent mind will take cognizance of the fact, that people do not usually enter the dwellings of others in the night time, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also. The fact of the entry alone, in the night time, accompanied by flight when discovered, is some evidence of guilt, and in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent.

*Id.* at 396-97, 1 S.E. at 927. We find that there was evidence of other intent, or explanatory facts and circumstances to preclude application of the *McBryde* inference of intent. Nothing in the evidence supports a finding that defendants entered the apartment with the intent to commit larceny.

Evidence presented by defendants and the State indicates that each defendant believed the apartment to be the dwelling of the other's girlfriend. Each defendant presented evidence that he believed the other defendant had permission to enter the apartment. Nothing in the apartment, according to the owner, had been disturbed. This is sufficient to rebut the *McBryde* inference of intent to steal. See *State v. Lamson*, 75 N.C. App. 132, 330 S.E. 2d 68, *disc. rev. denied*, 314 N.C. 545, 335 S.E. 2d 318 (1985).

We find that there was insufficient evidence to sustain a verdict of second degree burglary. However, we believe, and both defendants concede, that there was evidence from which the jury could have found defendants guilty of misdemeanor breaking or entering under G.S. 14-54(b). The felony charge must be stricken

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Dept. of Transportation v. Higdon

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and the case remanded for resentencing on the lesser-included offense of misdemeanor breaking or entering.

Vacated and remanded.

Judges WELLS and EAGLES concur.

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DEPARTMENT OF TRANSPORTATION v. LEWIS R. HIGDON AND WIFE, CAROL HIGDON; FIRST UNION NATIONAL BANK, TRUSTEE; AND ASHEVILLE FEDERAL SAVINGS AND LOAN ASSOCIATION

No. 8628SC295

(Filed 16 September 1986)

**Eminent Domain §§ 2.3, 13.2— regrading to improve access—no taking of property**

The trial court did not err in determining that the area taken by plaintiff was the area described in a plat filed by plaintiff, since the alteration of defendants' property outside of the area described in the plat did not amount to a taking but instead amounted to a regrading to improve access to defendants' remaining property.

APPEAL by defendants from *Lewis (Robert D.)*, Judge. Order entered 12 November 1985 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 27 August 1986.

Defendants' property was condemned for the purpose of widening Biltmore Avenue in Asheville, Buncombe County, North Carolina. After plaintiff condemned the property, it prepared and filed a plat showing the areas acquired from defendants. The plat indicated that 1,107 square feet for a new right-of-way, 459 square feet for a temporary slope easement and 380 square feet for a temporary construction easement were taken. Defendants presented evidence that the area taken was greater than that indicated in the plat in that 1,107 square feet of new right-of-way and 1,361 square feet of slope easement were taken for a total of 2,468 square feet. Defendants requested a hearing on the matter pursuant to G.S. 136-108.

The parties stipulated that plaintiff went beyond the area designated as appropriated in the plat. Plaintiff presented evidence which tended to show that although it had physically ex-



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Dept. of Transportation v. Higdon

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ceeded the appropriated area, it did so solely to improve access to defendants' remaining property.

Defendants presented evidence that tended to show the following facts. Prior to the construction, the entire 2,468 square foot area was a parking area with a more gradual, lesser slope. Plaintiff installed an earth and straw area replacing paved asphalt parking. Plaintiff also resloped and repaved the 2,468 square foot area making such area less accessible and less desirable than it was before the taking. The steeper slope was located closer to the building on defendants' property. These alterations were made without defendants' permission. As a result of the alteration of the 2,468 square foot area, the front parking lot was rendered useless. Additionally, defendants had to drop the level of the front of their property, and had to install a retaining wall and steps in order to enter the building.

The trial court found that the attempt by the State to improve access to the subject property by lowering the grade in order to tie into the parking lot more safely did not constitute a taking of more property than that originally described in the plat.

From the order entered in the superior court, defendants appeal.

*Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Guy A. Hamlin, for plaintiff appellee.*

*Patla, Straus, Robinson & Moore, by Jones P. Byrd, for defendant appellants.*

ARNOLD, Judge.

Defendants contend that the trial court erred in its determination that the area taken by plaintiff was the area described in the plat. We disagree.

In *Ledford v. Highway Comm.*, 279 N.C. 188, 190-91, 181 S.E. 2d 466, 468 (1971), our Supreme Court stated:

"Taking" under the power of eminent domain may be defined generally as entering upon private property for more than a momentary period and, under the warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as

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**Dept. of Transportation v. Higdon**

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substantially to oust the owner and deprive him of all beneficial enjoyment thereof.

*See also City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 338 S.E. 2d 794 (1986).

The alteration of defendants' property outside of the area described in the plat did not amount to a taking. In no way was this additional area devoted to a public use and defendants were neither substantially ousted nor deprived of all beneficial enjoyment of the area in question by the mere regrading of the property.

If, instead of modifying the access to defendants' property, plaintiff had impaired such access, defendants would likely have had a viable taking claim. *See Thompson v. Seaboard Air Line R.R.*, 248 N.C. 577, 104 S.E. 2d 181 (1958). Here, however, such is not the case and defendants' argument fails.

In *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 338 S.E. 2d 794 (1986), this Court held that a temporary taking had occurred when contractors constructing a city sewer project used a roadway over the defendant's property. The roadway was essential to provide access to the construction site and the use of the roadway flowed from the construction. This Court also held that the contractor's use of a staging area was not a taking because such staging area was not necessary to complete the project.

In the present case, the modification of defendants' property to provide access to Biltmore Avenue was in no way necessary or essential to the construction project. Therefore, no taking occurred.

Whether there is damage to defendants' remaining property as a result of the condemnation of the area described in the plat is a question more appropriately considered in the severed portion of this case concerning damages.

We find that the trial court did not err when it determined that the area taken was the area described in the plat. The decision of the trial court is

**Affirmed.**

**Judges EAGLES and PARKER concur.**

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**Dept. of Transportation v. Quick As A Wink**

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DEPARTMENT OF TRANSPORTATION v. QUICK AS A WINK OF ASHEVILLE WEST, INC.; AND GEORGE E. IVEY

No. 8628SC296

(Filed 16 September 1986)

APPEAL by defendants from *Lewis (Robert D.)*, Judge. Order entered 12 November 1985 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 27 August 1986.

Defendants' property was condemned for the purpose of widening Biltmore Avenue in Asheville, Buncombe County, North Carolina. After plaintiff condemned the property, it prepared and filed a plat showing the areas acquired from defendants. The plat indicated that 1,064 square feet for a new right-of-way, 452 square feet for a temporary slope easement and 446 square feet for a temporary construction easement were taken. Defendants presented evidence that the area taken was greater than that indicated in the plat in that 1,065 square feet of new right-of-way and 1,641 square feet of slope easement were taken for a total of 2,706 square feet. Defendants requested a hearing on the matter pursuant to G.S. 136-108.

The parties stipulated that plaintiff went beyond the area designated as appropriated in the plat. Plaintiff presented evidence which tended to show that although it had physically exceeded the appropriated area, it did so solely to improve access to defendants' remaining property.

Defendants presented evidence which tended to show the following facts. The existing dirt and asphalt that was in place was removed during the construction and the front of the property was regraded in a steeper slope. Plaintiff resloped, regraded, and repaved the 2,706 square foot area and located the steeper slope closer to the building and gasoline pumps on defendants' property making that area less accessible and less desirable. Plaintiff placed a "grassed island" within the 2,706 square foot area and destroyed curbing within that same area. Defendants claim that the business operation located on the premises has been damaged and that plaintiff exceeded the appropriated area without defendants' permission.

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Nationwide Mutual Fire Ins. Co. v. Pittman

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The trial court found that the change in the State's original plan by which the grade or the entrance to and exit from the car wash was lowered constituted an improvement of ingress and egress to the property and does not constitute a taking of more property than that described in the plat.

From the order entered in the superior court, defendants appeal.

*Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Guy A. Hamlin, for plaintiff appellee.*

*Patla, Straus, Robinson & Moore, by Jones P. Byrd, for defendant appellants.*

ARNOLD, Judge.

For the reasons set forth in *Dept. of Transportation v. Higdon*, 82 N.C. App. 752, 347 S.E. 2d 868 (1986), we affirm the order of the superior court.

Affirmed.

Judges EAGLES and PARKER concur.

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NATIONWIDE MUTUAL FIRE INSURANCE COMPANY v. MARY ARELIA  
PITTMAN

No. 8610SC226

(Filed 16 September 1986)

**Husband and Wife § 15; Insurance § 134— property destroyed by husband—  
amount of insurance proceeds to wife—payment to mortgagees**

Defendant as an innocent spouse was entitled to recover on a homeowner's policy where the property loss was caused by the wrongful acts of her husband, and the amount to which she was entitled was one-half of the amount of the agreed loss left over after mortgagees were paid.

APPEAL by defendants from *Read, Judge*. Judgment entered 12 December 1985 in WAKE County Superior Court. Heard in the Court of Appeals 20 August 1986.

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Nationwide Mutual Fire Ins. Co. v. Pittman

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On 21 July 1982, the marital home of James A. Pittman and Mary Arelia Pittman caught fire and burned. James Pittman was responsible for the fire, but Mary Pittman had moved out of the house and knew nothing of her estranged husband's plans to burn it down. The loss to the real property is valued at \$40,034.34.

The Pittmans did not own the property free and clear. Some four months after the house burned, the couple was in default on notes held by Southern National Bank and by Bankers Mortgage Corporation. Both companies were listed as loss payees on the Pittmans' homeowner's policy with Nationwide Insurance Company. On 30 November 1982 Nationwide paid the outstanding indebtedness of \$5,925.57 and took an assignment of mortgagee Southern National Bank's rights. Nationwide also paid off the note in favor of Banker's Mortgage Corporation and assumed its rights to collect \$13,001.88. Nationwide then issued defendant a check for \$1,089.72 for loss to the real property which she accepted with a full reservation of rights to her claim that she was owed an additional \$10,653.00.

Nationwide brought action seeking a declaration that it had paid all monies due defendant as a result of the fire. Defendant denied she had been paid all funds due and sought their recovery. Both parties filed motions for summary judgment. The court granted the defendant's motion and denied plaintiff's motion. Plaintiff appealed.

*Moore, Ragsdale, Liggett, Ray & Foley, P.A., by Peter M. Foley, for plaintiff-appellant.*

*Chavis & Locklear, by Kenneth E. Ransom, for defendant-appellee.*

WELLS, Judge.

In *Lovell v. Insurance Co.*, 302 N.C. 150, 274 S.E. 2d 170 (1981), our Supreme Court recognized the right of an innocent spouse to recover on a homeowner insurance policy where the property loss is caused by the wrongful acts of the other spouse. Although Nationwide agrees that the "innocent spouse doctrine" should apply in this case, it contests the manner in which the court below calculated the defendant's recovery. Nationwide argues that it should pay Ms. Pittman one-half of the agreed loss of

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**Conrad v. Conrad**

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\$40,034.34, with the defendant then responsible for the mortgages on the property. Nationwide's rationale is that, since Ms. Pittman was jointly and severally liable on the notes, she bore the risk of paying the full amount of the indebtedness and should be liable for it under these circumstances. The court below disagreed, basing its calculations upon *Lovell*. In that case, the Supreme Court directed that the insurance company pay the wife half of the amount left over *after* the mortgagees were paid. Using that same calculation, the result in the case at bar is that defendant was entitled to \$11,742.00—the distribution ordered by the court below. Since the trial court correctly based its formula on the one set out by our Supreme Court in *Lovell*, we are bound by that decision and therefore affirm.

Affirmed.

Chief Judge HEDRICK and Judge WEBB concur.

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MAXINE B. CONRAD v. JOSEPH E. CONRAD

No. 8626DC177

(Filed 16 September 1986)

**1. Divorce and Alimony § 30— equitable distribution—refusal to comply with order—payment of attorney fees required for purging from contempt**

The contempt power of the district court includes the authority to require one to pay attorney fees in order to purge oneself from a previous order of contempt for failing and refusing to comply with an equitable distribution order.

**2. Divorce and Alimony § 30— equitable distribution—award of stock—refusal to comply with order—purging from contempt—award of present value of stock proper**

In an order purging defendant of contempt for failure to comply with an order of equitable distribution of marital property, the trial court properly awarded plaintiff the present value of the stock which had been assigned to her when the initial judgment was entered, and this was properly accomplished by compensating plaintiff for the stock splits and dividends which had occurred between the time the judgment was entered and the time the order was entered purging defendant of contempt.

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Conrad v. Conrad

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APPEAL by defendant from *Brown (L. Stanley)*, Judge. Orders entered 9 August 1985 and 21 November 1985 in District Court, MECKLENBURG County. Heard in the Court of Appeals 19 August 1986.

Plaintiff and defendant were married in 1950. In 1981 they separated. In February 1982 plaintiff filed suit seeking equitable distribution. In June 1983 the equitable distribution claim was tried. On 10 November 1983, a written judgment was entered. Defendant did not appeal.

Defendant refused to comply with the terms of the equitable distribution judgment. On 4 June 1984, the court held a show cause hearing. The court then gave defendant 30 days to comply with the judgment. Defendant refused. On 13 August 1984, another hearing was held. On 20 August 1984, a judgment was entered finding that defendant had willfully refused to comply with the earlier judgment even though he had the ability to do so. The court adjudged defendant to be in contempt and ordered him incarcerated in the Mecklenburg County jail until he came forward with a proposal to deliver to plaintiff the property, part of which consisted of stock certificates, to which she was entitled.

On 23 July 1985, three hundred and forty-seven days after he had been held in contempt, the court entered an order which allowed defendant to be released from jail upon the transfer of certain money and stock certificates to the plaintiff. From this order, defendant appealed.

*Kenneth T. Davies for defendant appellant.*

*Delaney and Sellers, by Timothy G. Sellers, for plaintiff appellee.*

ARNOLD, Judge.

[1] The first issue presented for review is whether the court erred in awarding the plaintiff attorney fees. Defendant argues that attorney fees were not proper because the Equitable Distribution Act, G.S. 50-20 *et seq.*, does not provide for the recovery of attorney fees and because the court did not find defendant in wilful contempt of court.

In *Blair v. Blair*, 8 N.C. App. 61, 173 S.E. 2d 513 (1970), this Court held that a district court judge had the authority to require

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Conrad v. Conrad

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one whom he has found in wilful contempt of court for failure to comply with a child support order to pay reasonable counsel fees as a condition of being purged of contempt. We find the principles and reasons set forth in *Blair* to be persuasive and extend them to cases where equitable distribution is involved. We hold that the contempt power of the district court includes the authority to require one to pay attorney fees in order to purge oneself from a previous order of contempt for failing and refusing to comply with an equitable distribution order. Thus, we find no error in the court's award of attorney fees in this matter.

[2] Defendant also contends the court erred by "amending the judgment of equitable distribution." In each of his remaining questions defendant complains because the court required him to transfer to the plaintiff the present value of the stock which was awarded in the earlier judgment.

In its order purging defendant of contempt, the trial court awarded the plaintiff the present value of the stock which had been assigned to her when the initial judgment had been entered. This was accomplished by compensating her for the stock splits and the dividends which had occurred between the time the judgment was entered and the time the order was entered purging defendant of contempt. It was proper for the trial court to require the defendant to compensate the plaintiff for the stock splits and the dividends which she would have received had defendant not been recalcitrant in carrying out the trial court's orders. To hold consistent with the defendant's position would encourage people to disobey the trial court's orders knowing that the court could not require them to compensate their former spouse for monetary loss caused by their actions. We decline to accept this position. We have carefully reviewed the order purging the defendant of contempt and find it to be proper.

Affirmed.

Judges EAGLES and PARKER concur.



## CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 2 SEPTEMBER 1986

|  |                            |  |
|--|----------------------------|--|
| ATKINS v. FORSYTH<br>INTERNATIONAL, LTD.<br>No. 8621SC345                    | Forsyth<br>(84CVS1403)     | Affirmed                               |
| ATLANTIC OIL SERVICE, INC.<br>v. STIREWALT<br>No. 8619SC307                  | Rowan<br>(85CVS1049)       | Affirmed                               |
| BRITT v. CAROLINA AQUATECH<br>POOLS AND PATIO SHOP,<br>INC.<br>No. 8612DC137 | Cumberland<br>(85CVD2968)  | Vacated and<br>Remanded                |
| BROWN v. BOONE<br>No. 8618SC309  | Guilford<br>(85CVS6853)    | Affirmed                               |
| CHIPMAN v. CHIPMAN<br>No. 8625SC340  | Catawba<br>(85CVD1172)     | Vacated and<br>Remanded                |
| DEPARTMENT OF<br>TRANSPORTATION v.<br>DALTON<br>No. 8617SC24                 | Rockingham<br>(83CVS1253)  | Affirmed                               |
| EVANS v. HEINTZ<br>No. 8617SC374   | Surry<br>(85CVS702)        | Appeal<br>Dismissed                    |
| GRAHAM v. MORRISON<br>No. 8527SC1244   | Gaston<br>(81CVS2924)      | Affirmed in part;<br>remanded in part. |
| HOFFMAN v. N.C. DEPT. OF<br>MOTOR VEHICLES<br>No. 8626SC406                  | Mecklenburg<br>(85CVS9485) | Affirmed                               |
| IN RE WHITE<br>No. 8615DC357   | Orange<br>(85SP467)        | Affirmed                               |
| JOYE v. HOLBROOKS<br>No. 8619DC303   | Cabarrus<br>(85CVD984)     | Dismissed                              |
| MILLARD v. WATERS<br>No. 8627DC407   | Gaston<br>(84CVS1396)      | Reversed and<br>Remanded               |
| MILLER v. OLMERT<br>No. 8626SC314  | Mecklenburg<br>(83CVS8180) | No Error                               |
| ROGERS & HUDSON<br>PROPERTIES v. BEST<br>HEALTH, INC.<br>No. 8518SC862       | Guilford<br>(84CVS2300)    | No Error                               |
| SALTS v. LEDFORD<br>No. 8624DC316  | Mitchell<br>(84CVD113)     | Vacated and<br>Remanded                |

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| STATE v. BATTLE<br>No. 867SC418    | Nash<br>(85CRS14653)<br>(85CRS14654)                                 | No Error  |
| STATE v. BURNETTE<br>No. 8614SC311 | Durham<br>(85CRS4184)<br>(85CRS4185)                                 | No Error  |
| STATE v. BURRIS<br>No. 8627SC466   | Cleveland<br>(85CRS10434)  | Affirmed  |
| STATE v. CONNARD<br>No. 8618SC238  | Guilford<br>(85CRS64622)<br>(85CRS64621)                             | No Error  |
| STATE v. EDWARDS<br>No. 868SC324   | Wayne<br>(85CRS7349)   | No Error  |
| STATE v. EUBANKS<br>No. 8620SC246  | Richmond<br>(85CRS3459)<br>(85CRS3461)<br>(85CRS3465)<br>(85CRS3466) | No Error  |
| STATE v. GIBBS<br>No. 868SC454     | Lenoir<br>(85CRS7601)<br>(85CRS7602)                                 | No Error  |
| STATE v. HAMILTON<br>No. 868SC408  | Wayne<br>(85CRS6757)<br>(85CRS6758)<br>(85CRS6759)                   | No Error  |
| STATE v. HILL<br>No. 8612SC339     | Cumberland<br>(85CRS18069)<br>(85CRS18070)                           | No Error  |
| STATE v. HOLBERT<br>No. 8629SC425  | Henderson<br>(84CRS9491)   | No Error  |
| STATE v. HOPKINS<br>No. 852SC1218  | Beaufort<br>(84CRS3946)  | Affirmed  |
| STATE v. JACKSON<br>No. 8626SC351  | Mecklenburg<br>(85CRS55340)  | New Trial |
| STATE v. McRAE<br>No. 8620SC393    | Anson<br>(85CRS3314)<br>(85CRS3503)                                  | No Error  |
| STATE v. MORRIS<br>No. 8626SC387   | Mecklenburg<br>(85CRS50072)<br>(85CRS50073)<br>(85CRS50075)          | No Error  |

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| STATE v. MURRAY<br>No. 864SC306                        | Onslow<br>(85CRS12466)                                | No Error   |
| STATE v. NORMAN<br>No. 863SC470                        | Craven<br>(85CRS17733)                                | Affirmed   |
| STATE v. NORMAN<br>No. 8617SC258                       | Surry<br>(85CRS6688)                                  | No Error   |
| STATE v. PERVIS<br>No. 8610SC419                       | Wake<br>(85CRS6473)                                   | No Error   |
| STATE v. REYNOLDS<br>No. 8617SC359                     | Surry<br>(85CRS7315)                                  | No Error   |
| STATE v. SCOTT<br>No. 8616SC342                        | Scotland<br>(85CRS552)<br>(85CRS551)                  | No Error   |
| STATE v. SHARPE<br>No. 867SC338                        | Edgecombe<br>(85CRS1296)                              | Affirmed   |
| STATE v. SMITH<br>No. 8616SC448                        | Robeson<br>(85CRS6332)                                | No Error   |
| STATE v. SMITH<br>No. 8626SC292                        | Mecklenburg<br>(85CRS037631)<br>(85CRS037638)         | No Error   |
| STATE v. SMYRE<br>No. 8625SC348                        | Catawba<br>(85CRS8352)<br>(85CRS8353)<br>(85CRS10577) | Remanded for a<br>determination on<br>defendant's motion<br>to withdraw his<br>plea of guilty. |
| STATE v. TOLER<br>No. 862SC294                         | Beaufort<br>(84CRS4203)                               | No Error   |
| STATE v. TRUEBLOOD<br>No. 851SC1283                    | Perquimans<br>(85CRS350)                              | No Error   |
| STATE v. WALKER<br>No. 8629SC430                       | McDowell<br>(85CRS4848)                               | Remanded for<br>resentencing.  |
| STATE v. WESTER<br>No. 8618SC317                       | Guilford<br>(85CRS72933)                              | No Error   |
| STATE v. WINGO<br>No. 8626SC438                        | Mecklenburg<br>(85CRS44801)                           | No Error   |
| STATE v. WORLEY<br>No. 8618SC321                       | Guilford<br>(83CRS32776)<br>(83CRS48750)              | Affirmed   |
| WOOD v. LINDSAY PUBLISHING<br>COMPANY<br>No. 8610IC286 | Ind. Comm.<br>(I-2385)                                | Affirmed   |

## CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 16 SEPTEMBER 1986

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|--|----------------------------|--------------------------|
| BIVENS v. EIMCO-ELKHORN<br>No. 8610IC232             | Ind. Comm.<br>(936138)     | Affirmed                 |
| BLACK v. GENERAL CINEMA<br>CORP.<br>No. 8621SC277    | Forsyth<br>(84CVS1236)     | New Trial                |
| GRISWOLD v. GITAUTIS<br>No. 8629SC267                | Rutherford<br>(83CVS543)   | Reversed and<br>Remanded |
| HOUSE v. HOUSE<br>No. 862SC144                       | Martin<br>(84CVS103)       | Affirmed                 |
| NAUTILUS HOMES, INC. v.<br>BONCZEK<br>No. 861SC150   | Currituck<br>(85CVS59)     | Reversed and<br>Remanded |
| OCHRAN v. OCHRAN<br>No. 8526DC1172<br>No. 8526DC1297 | Mecklenburg<br>(84CVD8269) | Dismissed<br>No Error    |
| PETERSON v. PARKWAY<br>HOMES CO.<br>No. 8613SC189    | Bladen<br>(83CVS339)       | No Error                 |
| SIMS v. DRAVO CORP.<br>No. 8610IC197                 | Ind. Comm.<br>(902248)     | Vacated and<br>Remanded  |
| SPRINKLE v. ROBBINS<br>No. 865SC260                  | New Hanover<br>(84CVS941)  | No Error                 |

# **ANALYTICAL INDEX**

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## **WORD AND PHRASE INDEX**



# ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

## TOPICS COVERED IN THIS INDEX

|                             |                          |
|-----------------------------|--------------------------|
| ABATEMENT AND REVIVAL       | HOMICIDE                 |
| ACCOUNTS                    | HOSPITALS                |
| ADMINISTRATIVE LAW          | HUSBAND AND WIFE         |
| ADOPTION                    |                          |
| APPEAL AND ERROR            | INJUNCTIONS              |
| ARREST AND BAIL             | INSURANCE                |
| ASSAULT AND BATTERY         |                          |
| ASSIGNMENTS                 | JUDGMENTS                |
| ATTORNEYS AT LAW            | JURY                     |
| AUTOMOBILES AND             |                          |
| OTHER VEHICLES              | KIDNAPPING               |
|                             |                          |
| BROKERS AND FACTORS         | LABORERS' AND            |
| BURGLARY AND                | MATERIALMEN'S LIENS      |
| UNLAWFUL BREAKINGS          | LIMITATION OF ACTIONS    |
|                             |                          |
| CANCELLATION AND RESCISSION | MALICIOUS PROSECUTION    |
| OF INSTRUMENTS              | MASTER AND SERVANT       |
| CARRIERS                    | MORTGAGES AND DEEDS      |
| CONSTITUTIONAL LAW          | OF TRUST                 |
| CONTRACTS                   | MUNICIPAL CORPORATIONS   |
| CONVICTS AND PRISONERS      |                          |
| CORPORATIONS                | NARCOTICS                |
| COURTS                      | NEGLIGENCE               |
| CRIMINAL LAW                |                          |
|                             |                          |
| DAMAGES                     | PARENT AND CHILD         |
| DEEDS                       | PARTNERSHIP              |
| DIVORCE AND ALIMONY         | PHYSICIANS, SURGEONS AND |
|                             | ALLIED PROFESSIONS       |
|                             | PROCESS                  |
| EMINENT DOMAIN              | PUBLIC OFFICERS          |
| ESTOPPEL                    |                          |
| EVIDENCE                    | QUASI CONTRACTS AND      |
|                             | RESTITUTION              |
| FRAUD                       |                          |
|                             |                          |
| GAMBLING                    | RAPE AND ALLIED          |
| GUARANTY                    | OFFENSES                 |
|                             | RECEIVERS                |
|                             | REGISTRATION             |
| HEALTH                      | RULES OF CIVIL           |
| HIGHWAYS AND CARTWAYS       | PROCEDURE                |

SALES  
SEARCHES AND SEIZURES  
SOCIAL SECURITY AND  
    PUBLIC WELFARE  
STATE  
STATUTES  
  
TAXATION  
TRESPASS

TROVER AND CONVERSION  
TRUSTS  
  
UNFAIR COMPETITION  
UNIFORM COMMERCIAL CODE  
  
VENDOR AND PURCHASER  
  
WITNESSES



**ABATEMENT AND REVIVAL****§ 3. Abatement on Ground of Pendency of Prior Action in General**

There was no error in the denial of defendant's motion to abate based on a pending action in Texas. *Wohlfahrt v. Schneider*, 69.

**ACCOUNTS****§ 1. Open Accounts**

Failure to instruct on an open account did not harm defendant since his liability was established on an account stated. *Woodruff v. Shuford*, 260.

**§ 2. Accounts Stated**

The trial court did not err in denying defendant's motion for a directed verdict in an action to recover on an account stated for renovation work on defendant's property. *Woodruff v. Shuford*, 260.

**ADMINISTRATIVE LAW****§ 8. Scope and Effect of Judicial Review**

The superior court did not err by both reversing and remanding decisions of the State Board of Sanitarian Examiners to deny petitioners certification as registered sanitarians where reversal was proper because the Board's decisions were affected by an error of law and remand was necessary so that the Board could make its decisions in accordance with the correct legal standard. N.C.G.S. § 150A-51(4). *King v. N.C. State Bd. of Sanitarian Examiners*, 409.

**ADOPTION****§ 2. Parties and Procedure Generally**

The trial court acquired personal jurisdiction in an adoption proceeding in which the natural parents intervened where the natural parents served their motion to intervene upon the attorneys for the guardian ad litem and the Department of Social Services. *In re Baby Boy Shamp*, 606.

**§ 2.1. Consent to Adoption**

The trial court did not err in a contested adoption proceeding by denying the motions of the guardian ad litem and DSS for directed verdict and judgment n.o.v. on the issue of fraud. *In re Baby Boy Shamp*, 606.

The trial court did not err in its jury instructions in a contested adoption proceeding. *Ibid.*

**§ 2.2. Abandonment of Child**

The trial court erred by finding that a child had not been abandoned in an action in which petitioner sought to determine that his stepson had been abandoned by his natural father and to adopt the stepson. *O'Herron v. Jerson*, 434.

**APPEAL AND ERROR****§ 6.2. Finality as Bearing on Appealability**

A preliminary injunction restraining defendant from competing with his former employer in five states was immediately appealable. *Masterclean of North Carolina v. Guy*, 45.

### APPEAL AND ERROR — Continued

A partial summary judgment in plaintiff's favor on the issues of negligence, contributory negligence, and assumption of risk was not immediately appealable despite the trial court's recital that the order was a final judgment and there was no just reason for delay. *Schuch v. Hoke*, 445.

An appeal from orders requiring defendants to produce documents and things requested by plaintiff, denying motions to suppress evidence, and denying motions to dismiss for lack of an adversary hearing was dismissed as interlocutory. *S. v. Siegfried Corp.*, 678.

#### § 6.8. Appeals Based on Motions for Nonsuit or Judgment on the Pleadings

The denial of motions for a Rule 12(b)(6) dismissal and for summary judgment presented no question for appellate review. *In re Baby Boy Shamp*, 606.

#### § 19. Appeals in Forma Pauperis

The trial court did not abuse its discretion in refusing to allow petitioner to appeal as a pauper from the magistrate to the district court when her affidavit showed she owned a home worth \$27,150. *Atlantic Ins. & Realty Co. v. Davidson*, 251.

### ARREST AND BAIL

#### § 3.2. Warrantless Arrest; Legality of Vehicle Registration and License Checks and Resulting Arrests

An officer was justified in approaching defendant where he merely approached a motorist and asked to see a valid license and North Carolina permit. *S. v. Badgett*, 270.

### ASSAULT AND BATTERY

#### § 14. Sufficiency of Evidence

The evidence in a prosecution for assault on firemen was sufficient to show that defendant knew or had reasonable grounds to know that the victims were firemen. *S. v. Teasley*, 150.

#### § 14.3. Sufficiency of Evidence of Assault with a Deadly Weapon with Intent to Kill or Inflicting Serious Bodily Injury

The trial court did not err by denying defendant's motion to dismiss an assault charge where it would be reasonable to infer that defendant committed the assault. *S. v. Poole*, 117.

### ASSIGNMENTS

#### § 1. Rights and Interests Assignable

An assignment of the right to receive a C.O.D. payment was valid. *Gunby v. Pilot Freight Carriers, Inc.*, 427.

### ATTORNEYS AT LAW

#### § 7.5. Allowance of Fees as Part of Costs

The statute allowing an award of attorney fees and expenses in a shareholder derivative action does not require that the fees and expenses be paid out of a monetary benefit received by the corporation as a result of the action. *Lowder v. All Star Mills, Inc.*, 470.

**ATTORNEYS AT LAW — Continued**

Plaintiffs were successful on the merits in part in the prosecution of a shareholder derivative action so as to support an award of attorney fees under G.S. 55-55(d), notwithstanding the jury found that the controlling director did not misappropriate a corporate opportunity. *Ibid.*

The trial court's findings were insufficient to support amounts awarded as attorneys' fees in a shareholder derivative action. *Ibid.*

In awarding attorneys' fees in a shareholder derivative action, the court does not abuse its discretion in approving a gradual, annual increase in each attorney's hourly rate to account for his or her increased experience and expertise, and a variation in rates among attorneys who worked on different aspects of the representation may be justified by findings explaining the difference in terms of complexity, attorney experience, or relative success. *Ibid.*

The trial court erred in adding a merit bonus of \$40,000 to the fees awarded to plaintiffs' attorneys in a shareholder derivative action. *Ibid.*

**§ 12. Grounds for Disbarment**

Findings of fact by the State Bar that defendant had not notified a client of a draft from an insurance company and had appropriated the draft for his own use were supported by clear, cogent and convincing evidence. *N.C. State Bar v. Whited*, 531.

Findings by the State Bar that an attorney failed to notify a client of an insurance company draft, endorsed the check, and appropriated it for his own use supported a conclusion that he had engaged in conduct involving moral turpitude. *Ibid.*

The State Bar correctly concluded that defendant violated DR 5-105(A) by representing the estates of a passenger and the driver of an automobile in the division of a fund where the interests of the claimants were inevitably adverse. *Ibid.*

A conclusion by the State Bar that defendant failed to disclose the possible effect of his multiple representation was supported by clear, cogent and convincing evidence. *Ibid.*

The hearing committee of the State Bar did not abuse its discretion by disbarring defendant. *Ibid.*

**AUTOMOBILES AND OTHER VEHICLES****§ 6.5. Liability for Fraud in Sale of Motor Vehicles**

To make out a prima facie case for a private enforcement of the Vehicle Mileage Act through a civil action, a plaintiff must establish a violation of a requirement under the Act that was made with intent to defraud. *McCracken v. Anderson Chevrolet-Olds, Inc.*, 521.

The trial court erred by failing to direct a verdict in favor of defendant in an action in which plaintiff alleged that defendant had violated odometer disclosure requirements with intent to defraud. *Ibid.*

**§ 45.1. Evidence of Criminal Conviction Arising out of Same Accident as Civil Action**

There was no prejudice in an action arising from an automobile collision in the admission of testimony and a citation showing that defendant was charged with operating a motor vehicle under the influence of an intoxicating beverage. *Wagner v. Barbee and Seiler v. Barbee*, 640.

**AUTOMOBILES AND OTHER VEHICLES — Continued****§ 45.3. Evidence of Conduct or Events Subsequent to Accident**

The trial court properly excluded evidence that plaintiff had been intoxicated on two occasions months after the accident. *Wagner v. Barbee and Seiler v. Barbee*, 640.

**§ 46.1. Opinion Testimony as to Facts Surrounding Accident other than Speed**

There was no prejudicial error in an action arising from a collision between an automobile and a motorcycle in the admission of the opinion testimony of the investigating officer regarding the point of impact. *Wagner v. Barbee and Seiler v. Barbee*, 640.

There was no prejudice in an action arising from an automobile accident in the admission of a doctor's opinion regarding the blood alcohol level of a passenger. *Ibid.*

There was no prejudice to defendant in an action arising from a collision between an automobile and a motorcycle in the admission of the investigating officer's opinion testimony about how the accident occurred because the testimony corroborated the testimony of defendant. *Ibid.*

**§ 88. Sufficiency of Evidence of Contributory Negligence Generally**

The evidence failed to establish contributory negligence by defendant as a matter of law in colliding with a tractor-sweeper operated by plaintiff after being confronted with reduced visibility resulting from dust created by the tractor-sweeper. *Allen v. Pullen*, 61.

**§ 90.7. Instructions on Sudden Emergency**

The trial court erred in instructing the jury on the applicability of the doctrine of sudden emergency. *Masciulli v. Tucker*, 200.

**§ 90.9. Failure to Give Instructions on Particular Issues**

The trial court erred in refusing to instruct on defendant's duty to maintain a proper lookout. *Masciulli v. Tucker*, 200.

The trial court erred by refusing to instruct on defendant's failure to maintain proper control of her automobile. *Ibid.*

**§ 94.7. Contributory Negligence of Passenger; Particular Circumstances; Knowledge that Driver Is Intoxicated**

The trial court erred in an action arising from an automobile accident by directing a verdict for defendant based on deceased's failure to notice defendant's intoxication. *Kinney v. Baker*, 126.

Summary judgment should not have been granted for defendant in an action arising from an automobile accident based on the contributory negligence of the passenger. *Baker v. Mauldin*, 404.

**§ 126.2. Driving under the Influence; Blood and Breathalyzer Tests Generally**

The trial court did not err in a prosecution for driving while impaired by admitting testimony from which the jury could deduce that defendant was administered two breathalyzer tests. *S. v. Harper*, 398.

**§ 130. Driving under the Influence; Verdict and Punishment Generally**

Defendant's argument that the trial court denied him a limited driving privilege because he exercised his right to a jury trial was not supported by his exception in the record. *S. v. Harper*, 398.

**BROKERS AND FACTORS****§ 4.1. Liabilities of Real Estate Brokers**

The trial court erred by directing a verdict for defendant real estate brokers in an action for constructive fraud. *Spence v. Spaulding and Perkins, Ltd.*, 665.

**BURGLARY AND UNLAWFUL BREAKINGS****§ 5. Sufficiency of Evidence Generally**

The evidence was insufficient to support the conviction of two defendants for second degree burglary but would support a verdict of guilty of misdemeanor breaking or entering. *S. v. Humphries*, 749.

**§ 7. Instructions on Lesser Included Offenses**

There was no prejudice in a prosecution for burglary from the trial court's failure to submit misdemeanor breaking and entering on the theory that defendant intended to have consensual sexual intercourse because defendant's conviction was based on intent to commit larceny. *S. v. Oliver*, 135.

**§ 10.2. Possession of Housebreaking Implements; Admissibility of Evidence**

Evidence that burglary tools were found in an automobile defendant was driving but did not own was sufficient to support defendant's conviction of felonious possession of burglary tools. *S. v. Roberts*, 733.

**CANCELLATION AND RESCISSION OF INSTRUMENTS****§ 1. Nature and Essentials of Remedy Generally**

In an action to set aside a deed on grounds of fraud and mental incompetence of the grantor, testimony by defendant as to certain conversations she had with plaintiff grantor before the contested deed was executed was not rendered inadmissible by the Dead Man's Statute. *Peterson v. Finger*, 743.

**§ 4. Cancellation and Rescission for Mutual Mistake**

The trial court erred by allowing defendant's motion for a directed verdict in an action for rescission based on mutual mistake arising from defendant's agent's erroneous description of the boundaries of a tract of real property. *Howell v. Waters*, 481.

**CARRIERS****§ 11.1. Failure to Collect C.O.D.**

The trial court correctly granted summary judgment in favor of plaintiffs in an action for a shipper and a carrier for failure to collect for a C.O.D. delivery. *Gunby v. Pilot Freight Carriers, Inc.*, 427.

**CONSTITUTIONAL LAW****§ 12.1. Police Power; Regulation of Specific Trades and Professions**

Statutes pertaining to the licensing of private investigators do not violate due process and equal protection. *Shipman v. N.C. Private Protective Services Bd.*, 441.

**§ 30. Discovery; Access to Evidence**

Defendant was not prejudiced by the trial court's alleged failure to grant his motion to discover his prior criminal record. *S. v. Teasley*, 150.

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**CONSTITUTIONAL LAW — Continued**

The trial court in a prosecution for taking indecent liberties did not err in quashing subpoenas duces tecum issued by defendant upon a children's home for the production of all its files and records relating to the victim and another witness, both of whom were residents of the home. *S. v. Newell*, 707.

**§ 31. Affording the Accused the Basic Essentials for Defense**

There was no prejudicial error in the denial of defendant's motion for funds to hire a private investigator, a ballistics expert, and a medical expert. *S. v. Newton*, 555.

**§ 34. Double Jeopardy**

A single series of acts may not support convictions for armed robbery and felonious larceny when there has been only one taking from one victim at one time. *S. v. Hurst*, 1.

Defendant could properly be tried for robbery with a dangerous weapon in violation of G.S. 14-87 even though he had previously been tried and convicted of robbery with a dangerous weapon in violation of 18 U.S.C. § 2113(d). *S. v. Myers*, 299.

**§ 44. Right to Counsel; Time to Prepare Defense**

There was no merit to defendant's contention that he was denied effective assistance of counsel by the denial of his motion for a continuance. *S. v. Teasley*, 150.

**§ 46. Removal or Withdrawal of Appointed Counsel**

The trial court did not err by considering the indigent defendant's request for another counsel without a formal hearing. *S. v. Hurst*, 1.

**§ 48. Effective Assistance of Counsel**

The trial court did not err by denying defendant's motion for appropriate relief based on ineffective assistance of counsel. *S. v. Moorman*, 594.

**§ 72. Right of Confrontation; Use of Confession or Inculpatory Statement of Co-defendant**

The trial court erred in allowing the State to introduce a statement from a codefendant which implicated defendant where the codefendant was unavailable for cross-examination at the trial. *S. v. Roberts*, 733.

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**CONTRACTS****§ 7.1. Contracts Restricting Business Competition between Employers and Employees**

Provisions in a contract of employment that the employee would not work for another in competition with the employer in any city or town in the U.S. in which the employer is doing or has signified its intention of doing business are patently unreasonable as to territory, and the court had no authority to reform the contract by reducing the territory to five states. *Masterclean of North Carolina v. Guy*, 45.

**§ 21. Sufficiency of Performance**

There was no merit to a developer's contention that it had substantially performed its duties under a contract to build a boat basin, access channel, and a paved access road. *Lyerly v. Malpass*, 224.

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**CONTRACTS — Continued****§ 27.1. Sufficiency of Evidence of Existence of Contract**

The law implied a contract whereby defendant patient was primarily liable to plaintiff hospital for the reasonable value of the services rendered on her behalf. *Forsyth Co. Hospital Authority, Inc. v. Sales*, 265.

**CONVICTS AND PRISONERS****§ 2. Discipline and Management**

The trial court erred by holding that the confiscation of excess funds found in the possession of an inmate was unconstitutional. *In re Petition of Kermit Smith*, 107.

**CORPORATIONS****§ 6. Right of Stockholders to Maintain Action**

The statute allowing an award of attorney fees and expenses in a shareholder derivative action does not require that the fees and expenses be paid out of a monetary benefit received by the corporation as a result of the action. *Lowder v. All Star Mills, Inc.*, 470.

Plaintiffs were successful on the merits in part in the prosecution of a shareholder derivative action so as to support an award of attorney fees under G.S. 55-55(d), notwithstanding the jury found that the controlling director did not misappropriate a corporate opportunity. *Ibid.*

The trial court's findings were insufficient to support amounts awarded as attorneys' fees in a shareholder derivative action. *Ibid.*

In awarding attorneys' fees in a shareholder derivative action, the court does not abuse its discretion in approving a gradual, annual increase in each attorney's hourly rate to account for his or her increased experience and expertise, and a variation in rates among attorneys who worked on different aspects of the representation may be justified by findings explaining the difference in terms of complexity, attorney experience, or relative success. *Ibid.*

The trial court erred in adding a merit bonus of \$40,000 to the fees awarded to plaintiffs' attorneys in a shareholder derivative action. *Ibid.*

**§ 15. Liability of Officers and Directors for Torts**

The president of a corporation could be held personally liable for the conversion of a crane leased by his company. *Esteel Co. v. Goodman*, 692.

**COURTS****§ 9.4. Jurisdiction to Review Rulings of another Superior Court Judge; Motions for Summary Judgment**

The trial court erred by granting a partial summary judgment for plaintiffs where the issues before the court were the same as the issues previously heard by another judge. *Furr v. Carmichael*, 634.

**§ 21.10. Conflict of Laws between States; Security Interests**

Substantive issues in an action involving a note and security agreement were to be resolved by application of Texas law and procedural issues by application of North Carolina law. *Wohlfahrt v. Schneider*, 69.

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**CRIMINAL LAW****§ 6. Mental Capacity as Affected by Intoxicating Liquor**

The trial court did not err by refusing to instruct the jury on voluntary intoxication. *S. v. Hurst*, 1.

**§ 26.5. Former Jeopardy; Same Acts or Transactions Violating Different Statutes**

A prosecution for robbery with a firearm was not barred by an earlier acquittal on the charge of possession of a firearm by a felon where defendant had moved to sever the charges since the charge of possession of a firearm by a felon would require proof of a previous conviction of common law robbery, the State had procured both indictments before placing defendant on trial for either charge, and the State made no effort to use one of the charges as a dry run for the other. *S. v. Alston*, 372.

**§ 34.2. Evidence of Defendant's Guilt of other Offenses; Admission of Inadmissible Evidence as Harmless Error**

There was no prejudice in a prosecution for possession of stolen property from testimony that defendant was involved with cocaine. *S. v. White*, 358.

**§ 34.5. Admissibility of Evidence of other Offenses to Show Identity of Defendant**

The trial court did not err in an armed robbery prosecution by admitting testimony concerning another armed robbery which occurred two days after the robberies with which defendant was charged. *S. v. Williams*, 281.

**§ 42. Articles Connected with the Crime Generally**

There was no merit to defendant's contention that certain items should have been excluded because none of the items were relevant to the crimes of trafficking in cocaine or assault on a fireman. *S. v. Teasley*, 150.

**§ 66.16. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Photographic Identifications**

There was no error in the admission of a photographic lineup or the admission of a detective's testimony regarding the lineup. *S. v. Morgan*, 674.

**§ 66.20. Voir Dire to Determine Admissibility of In-Court Identification Generally; Findings of Court**

The trial court's findings of fact were sufficient to support the denial of defendant's motion to suppress the victim's in-court identification as tainted by an impermissible pre-arrest photographic identification even though the court did not recite that the findings were based on clear, strong, and convincing evidence. *S. v. Oliver*, 135.

**§ 70. Tape Recordings**

There was no prejudicial error in the admission of a taped conversation and a transcript of that conversation. *S. v. Hurst*, 1.

**§ 74.2. Confession by Codefendant; Incompetency**

The trial court erred in allowing the State to introduce a statement from a codefendant which implicated defendant where the codefendant was unavailable for cross-examination at the trial. *S. v. Roberts*, 733.

**§ 75. Admissibility of Confession Generally; Tests of Voluntariness**

The evidence was sufficient to support the trial court's finding that defendant's in-custody statement was freely, voluntarily and understandingly made although



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**CRIMINAL LAW — Continued**

there was evidence that defendant's ability to read and write was poor. *S. v. Bullard*, 718.

**§ 75.10. Confession; Waiver of Constitutional Rights Generally**

The trial court did not err in a prosecution for driving while impaired by finding that defendant's statements to a highway patrol trooper were knowingly, understandingly and voluntarily made after he had waived his right to silence and his right to counsel. *S. v. Harper*, 398.

**§ 88.5. Recross-examination**

The trial court did not abuse its discretion by denying defendant the opportunity to recross-examine witnesses. *S. v. Moorman*, 594.

**§ 89.1. Credibility of Witnesses; Character Witnesses**

The court committed plain error in a prosecution for taking indecent liberties with a child by permitting a pediatrician and a child psychologist to testify that the child had testified truthfully. *S. v. Holloway*, 586.

**§ 91. Speedy Trial**

The trial court did not err in denying defendant's motion to continue made on the ground that defense counsel did not have an opportunity to look at the transcript of defendant's first trial until the morning of the second trial. *S. v. Newell*, 707.

**§ 95.2. Admission of Evidence Competent for Restricted Purpose; Form and Effect of Instruction**

There was no merit to defendant's contention that the trial court failed to instruct the jury that a witness's testimony was admitted only for the limited purpose of establishing identity. *S. v. Williams*, 281.

**§ 98. Presence of Defendant at Trial**

There was no prejudicial error in a trial in which defendant was shackled. *S. v. Wright*, 450.

**§ 98.1. Misconduct of Witnesses**

The trial court did not err by denying defendant's motion for a mistrial due to emotional outbursts and contrary answers from the victim during defendant's testimony. *S. v. Newton*, 555.

**§ 99.2. Remarks by the Court during Trial**

Comments by the trial judge both in and out of the jury's presence were entirely unnecessary and improper but not prejudicial. *S. v. Moorman*, 594.

**§ 102.6. Prosecutor's Jury Argument; Particular Conduct and Comments**

The trial court did not commit reversible error by failing to strike a prosecutor's argument that was susceptible to the interpretation that the jury should convict defendant to keep him from returning to commit murder. *S. v. Hurst*, 1.

**§ 124.5. Inconsistency of Verdict**

The trial court did not err in allowing inconsistent jury verdicts finding the codefendant not guilty of kidnapping or first degree rape while finding defendant guilty of second degree rape. *S. v. Bullard*, 718.

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**CRIMINAL LAW — Continued****§ 131. New Trial for Newly Discovered Evidence**

The trial court properly denied defendant's post-trial motion for appropriate relief based on newly-discovered evidence. *S. v. Newell*, 707.

**§ 138.7. Severity of Sentence; Particular Matters and Evidence Considered**

Defendant was not denied the opportunity to make a statement on his own behalf during sentencing where he was only denied the opportunity to speak during a post-trial motion. *S. v. Newton*, 555.

**§ 138.14. Severity of Sentence; Consideration of Aggravating and Mitigating Factors in General**

A case was remanded for resentencing where convictions for armed robbery and felonious larceny were consolidated for judgment and sentencing and judgment was arrested on the armed robbery conviction. *S. v. Hurst*, 1.

The trial court had no duty to make findings regarding aggravating and mitigating factors where the court imposed presumptive terms. *S. v. Teasley*, 150; *S. v. Newell*, 707.

**§ 138.21. Aggravating Factors; Especially Heinous, Atrocious, or Cruel Offense**

The evidence was insufficient to show that an assault was especially heinous, atrocious or cruel. *S. v. Newton*, 555.

The evidence justified a sentence in excess of the presumptive term for assault based on evidence of an especially heinous, atrocious or cruel offense. *S. v. Poole*, 117.

**§ 138.24. Aggravating Factors; Physical Infirmary of Victim**

The trial court erred by finding the victim's physical infirmity as an aggravating factor. *S. v. Newton*, 555.

**§ 138.26. Aggravating Factors; Great Monetary Loss**

The trial court properly found damage causing great monetary loss as an aggravating factor. *S. v. Newton*, 555.

**§ 138.28. Aggravating Factors; Prior Convictions**

The trial court did not err by sentencing defendant to a term in excess of the presumptive based upon a prior conviction. *S. v. Morgan*, 674.

**§ 141. Sentence for Repeated Offenses**

Defendant was entitled to a new sentencing hearing where the trial court treated a violation of the Habitual Felon Act as a separate substantive offense. *S. v. Thomas*, 682.

**§ 143.4. Right to Counsel at Probation Revocation Hearing**

Defendant's waiver of counsel in his parole revocation hearing was effective. *S. v. Warren*, 84.

**§ 143.12. Sentence upon Revocation of Probation**

The trial court did not err in a probation revocation hearing by failing to designate in the judgment order that the activated sentences were to run consecutively with another sentence. *S. v. Warren*, 84.

**§ 162. Necessity for Objections to Evidence**

Defendant was precluded by his failure to object at trial from raising on appeal the admissibility of testimony concerning the value of a stolen class ring or the

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**CRIMINAL LAW — Continued**

court's recapitulation of conflicting evidence of the value of the ring. *S. v. White*, 358.

**DAMAGES****§ 13.1. Competency of Evidence; Nature and Extent of Personal Injuries**

The trial court properly admitted medical testimony that plaintiff suffered stress and depression as a result of injuries he received in an automobile accident and a medical bill for the treatment of plaintiff's depression. *McNabb v. Town of Bryson City*, 385.

**§ 13.3. Competency of Evidence; Market Value of Personal Property**

In a negligence action arising from the theft of jewelry from an automobile, an exhibit which listed all the articles of jewelry stolen and their wholesale prices but did not mention the words "fair market value" provided evidence of damages. *Southern Watch Supply Co. v. Regal Chrysler-Plymouth*, 21.

**DEEDS****§ 6.1. Acknowledgment**

G.S. 39-13.1 and G.S. 52-8 did not operate to cure a 1947 deed which was void because the certifying officer taking the acknowledgment of the wife failed to state in his certificate his conclusions as to whether the conveyance was unreasonable or injurious to the wife. *West v. Hays*, 574.

**§ 18. Covenants in Regard to Improvements**

While there may have been no written document in which defendant developer expressly agreed to build a boat basin, dredge a channel to certain minimum requirements and construct a road to specifications, there was clearly an implied promise as part of the contract of purchase and sale arising from the covenants, plats, and oral representations that defendant would complete these amenities. *Lyerty v. Malpass*, 224.

**§ 20.1. Restrictive Covenants as to Business Activities**

Restrictive covenants did not prohibit defendant's plan for a free, fourteen-space public parking lot and pedestrian ramp providing public beach access. *White v. Town of Emerald Isle*, 392.

**§ 20.6. Who May Enforce Restrictive Covenants**

Plaintiff homeowners' association lacked standing to bring an action in its own name to enforce unrecorded restrictions against a unit owner. *Laurel Park Villas Homeowners Assoc. v. Hodges*, 141.

**DIVORCE AND ALIMONY****§ 20.3. Attorney's Fees in Alimony Action**

The trial court erred in awarding attorney's fees to defendant without findings concerning whether the attorney's rates were in line with those customarily charged. *Peak v. Peak*, 700.

**§ 24.4. Enforcement of Child Support Orders; Contempt**

There was no merit to defendant's contention that the trial court erred in ordering him imprisoned without having established that he had property free and

### DIVORCE AND ALIMONY — Continued

clear of any liens that he could use to purge himself of the alleged contempt. *Adkins v. Adkins*, 289.

#### § 24.5. Modification of Child Support Order

A lump sum payment of \$17,000 to defendant wife upon her withdrawal from the marital home pursuant to a consent judgment represented not only child support but also a settlement of defendant's property and support rights, and the court had no authority to order a refund to plaintiff husband of a pro rata portion of the lump sum payment when custody of a minor child who had been residing with defendant was transferred to plaintiff. *Reavis v. Reavis*, 77.

#### § 24.6. Child Support; Burden of Proof; Sufficiency of Evidence Generally

Defendant in an action to recover arrearages in child support could not rely on the defense of equitable estoppel. *Adkins v. Adkins*, 289.

#### § 25.7. Modification of Child Custody Order; Changed Circumstances

Interference with visitation of the noncustodial parent which has a negative impact on the welfare of the child can constitute a substantial change of circumstances sufficient to warrant a change of custody. *Woncik v. Woncik*, 244.

#### § 25.9. Modification of Child Custody Order; Where Evidence of Changed Circumstances is Sufficient

Evidence in a child custody proceeding was sufficient to support the trial court's findings with regard to changed circumstances. *Woncik v. Woncik*, 244.

#### § 25.12. Child Custody; Visitation Privileges

The trial court properly fashioned an order giving the father custody and allowing him to terminate the mother's visitation rights pending a court hearing should she engage in actions designed to alienate the child's affections for his father. *Woncik v. Woncik*, 244.

#### § 30. Equitable Distribution

The evidence in an equitable distribution action was sufficient to support the trial court's determination as to the ownership interest held by plaintiff in a cemetery. *Hartman v. Hartman*, 167.

The trial court's findings in an equitable distribution action pertaining to valuation of stock owned by plaintiff were supported by the evidence. *Ibid.*

There was no abuse of discretion by the trial court in a proceeding for the equitable distribution of marital property in awarding all of the stock in a closely held corporation to one of the parties. *Ibid.*

Defendant was not prejudiced by the court's distribution of marital property because plaintiff was awarded items of property valued at more than twice what the items of property were which were awarded to defendant, since the court, in order to make the distribution equitable, required plaintiff to pay the mortgage on the former homeplace of the parties and required him to make a lump sum payment to defendant. *Ibid.*

The trial court erred in considering parol evidence in determining that the parties to a proceeding for equitable distribution of marital property owned a one-half interest in a lake house and lot. *Ibid.*

When evaluating and distributing pension and retirement benefits in an equitable distribution action, the trial court may properly consider the advantages and disadvantages of the present discounted value method or the award of a fixed percentage of future payments. *Seifert v. Seifert*, 329.

**DIVORCE AND ALIMONY — Continued**

The trial court erred in an equitable distribution action in its order of evaluation and distribution of defendant's vested military pension and benefit rights by impermissibly utilizing a present value and ordering a deferred payment. *Ibid.*

The trial court did not err in an equitable distribution action by refusing to allow into evidence the amount of defendant's base pay at the day of trial. *Ibid.*

The trial court in a divorce and equitable distribution action did not err by awarding plaintiff a one-half undivided interest in real property which had a value of \$316,193 in 1972, the year of separation, and a value of \$913,889 in 1983, the year absolute divorce was granted. *Swindell v. Lewis*, 423.

The trial court did not err by ordering joinder of Swindell's heirs at law as necessary parties where an action for divorce and equitable distribution was brought while he was alive and the administrator of his estate was substituted as a party after his death. *Ibid.*

The contempt power of the district court includes the authority to require one to pay attorney fees in order to purge oneself from a previous order of contempt for refusing to comply with an equitable distribution order. *Conrad v. Conrad*, 758.

In an order purging defendant of contempt for refusal to comply with an order of equitable distribution, the trial court properly awarded plaintiff the present value of the stock which had been assigned to her when the initial judgment was entered, including subsequent stock splits and dividends. *Ibid.*

The trial court did not err in determining that \$9,000 inherited by defendant from her mother and used to help pay the mortgage on entirety property was not separate property but constituted a gift to the marital estate notwithstanding defendant's contrary testimony. *Draughon v. Draughon*, 738.

The trial court improperly valued plaintiff's landscaping business for equitable distribution purposes by using the net value of the tangible assets without giving any consideration to the goodwill of the business. *Ibid.*

The net value placed by the trial court on plaintiff's tools for equitable distribution purposes was unsupported by the evidence. *Ibid.*

Where defendant contributed \$5,000 in marital property toward the purchase of a home for plaintiff one year after the parties' separation, she was entitled to an increase in the value of her original contribution, but the court's findings were insufficient to support the court's award of a \$3,000 increase. *Peak v. Peak*, 700.

Where an amendment making pension benefits marital property took effect three days after plaintiff instituted an equitable distribution action, the trial court did not err in finding that the impact of the amendment upon defendant was harsh and in using this finding as one of nine in forming an opinion that an equal distribution of marital property would not be equitable. *Ibid.*

**EMINENT DOMAIN****§ 2.3. "Taking" through Interference with Access to Highway or Street**

The alteration of defendants' property outside the area described in a plat filed by plaintiff DOT did not amount to a taking but constituted only a regrading to improve access to defendants' remaining property. *Dept. of Transportation v. Higdon*, 752.

**§ 3. Necessity of Public Purpose under Power of Eminent Domain**

An order permitting the City of Charlotte to condemn defendants' lot for a public park was valid. *City of Charlotte v. Roussio*, 588.

**EMINENT DOMAIN — Continued****§ 6.4. Other Evidence of Value**

There was no error in a condemnation case in the exclusion of expert testimony regarding the fair market value of land based on lost business income. *Dept. of Trans. v. Byrum*, 96.

**ESTOPPEL****§ 4.7. Equitable Estoppel; Sufficiency of Evidence**

Defendant in an action to recover arrearages in child support could not rely on the defense of equitable estoppel. *Adkins v. Adkins*, 289.

**EVIDENCE****§ 11. Transactions or Communications with Decedent in General**

In an action to set aside a deed on grounds of fraud and mental incompetence of the grantor, testimony by defendant as to certain conversations she had with plaintiff grantor before the contested deed was executed was not rendered inadmissible by the Dead Man's Statute. *Peterson v. Finger*, 743.

**§ 29. Private Writings and Records in General**

The trial court did not err in a negligence action arising from the theft of jewelry from an automobile by admitting an exhibit which purported to list all the articles of jewelry that were stolen and their wholesale prices. *Southern Watch Supply Co. v. Regal Chrysler-Plymouth*, 21.

**§ 29.3. Hospital Records and other Documents**

Military medical records showing that plaintiff attempted suicide and complained of back pain while in the Army in 1972 were not admissible in an action brought by plaintiff motorcyclist to recover for physical and psychological injuries received in a 1983 collision. *McNabb v. Town of Bryson City*, 385.

**§ 33.1. Writings as Hearsay**

The trial court did not err in a negligence action arising from the theft of jewelry from an automobile trunk by admitting into evidence a police incident report where the officer who testified did not make the report. *Southern Watch Supply Co. v. Regal Chrysler-Plymouth*, 21.

**FRAUD****§ 7. Constructive Fraud**

There was sufficient evidence of constructive fraud in a transaction with a real estate agent. *Sanders v. Spaulding and Perkins, Ltd.*, 680.

**§ 12. Sufficiency of Evidence**

The trial court erred by denying defendants' motion for a directed verdict on a claim of fraud where plaintiff alleged that defendant had agreed to accrue stock for her in a corporation. *Britt v. Britt*, 303.

**§ 13. Instructions and Damages**

The trial court did not err in an action for fraud against licensed real estate agents by submitting punitive damages to the jury. *Sanders v. Spaulding and Perkins, Ltd.*, 680.

**GAMBLING****§ 1. Generally**

The prohibition against two sessions of bingo within a 48-hour period is constitutional. *Durham Highway Fire Protection Assoc. v. Baker*, 583.

**GUARANTY****§ 1. Generally**

A sister of a hospital patient was secondarily liable pursuant to the express provisions of the guaranty agreement she had signed. *Forsyth Co. Hospital Authority, Inc. v. Sales*, 265.

**HEALTH****§ 1. Boards of Health**

The superior court correctly ruled that the State Board of Sanitarian Examiners' denials of petitioners' requests for certification as registered sanitarians were affected by an error of law. *King v. N.C. State Bd. of Sanitarian Examiners*, 409.

**HIGHWAYS AND CARTWAYS****§ 9.2. Proceedings under Tort Claims Act**

A decision by defendant DOT not to erect a guardrail along an embankment was not negligence entitling plaintiff to recover for the deaths of her two daughters whose car hit a patch of ice and fell down the embankment. *Hochheiser v. N. C. Dept. of Transportation*, 712.

**HOMICIDE****§ 28.1. Duty of Trial Court to Instruct on Self-Defense**

The trial court in a homicide case erred in failing to charge on self-defense. *S. v. Blankenship*, 285.

The trial court in a first degree murder case erred in refusing to instruct the jury on self-defense where defendant's testimony would support a finding that he had a reasonable belief that it was necessary to strike the victim with a baseball bat to protect himself from death or great bodily harm. *S. v. Hughes*, 724.

**HOSPITALS****§ 3.2. Liability of Noncharitable Hospital for Negligence of Employees**

In an action to recover for injuries received by the elderly plaintiff when she fell and fractured her hip while a patient in the intensive-coronary care unit of defendant hospital, plaintiff's forecast of evidence was sufficient to permit the jury to infer that defendant hospital was negligent in failing to make direct nurse-patient assignments on the night of plaintiff's injury. *Griggs v. Morehead Memorial Hospital*, 131.

**HUSBAND AND WIFE****§ 11.1. Operation and Effect of Separation Agreement**

Plaintiff mother waived her claim for breach of a provision of a separation agreement requiring defendant father to pay their daughter's college expenses with respect to monies already paid by plaintiff. *Altman v. Mums*, 102.

### HUSBAND AND WIFE — Continued

The trial court had authority to order child support in a lesser sum than that provided for in the parties' separation agreement. *Bottomley v. Bottomley*, 231.

The trial court's findings of fact were insufficient to support its conclusion that the parties' agreed upon amount of child support was excessive. *Ibid*.

#### § 12.1. Revocation and Rescission of Separation Agreement

Where a separation agreement required defendant father to pay for his daughter's college education but made no distinction between a private and a public college, allowing the daughter to attend a private college did not constitute additional consideration which would support an oral modification of the agreement providing for each parent to pay one-half of the daughter's college expenses. *Altman v. Munns*, 102.

#### § 15. Estate by Entireties; Nature and Incidents of Estate Generally

Where a loss by fire was caused by the wrongful acts of defendant's husband, defendant as an innocent spouse was entitled to recover under a homeowner's policy one-half of the amount of the agreed loss left over after the mortgagees were paid. *Nationwide Mutual Fire Ins. Co. v. Pittman*, 756.

### INJUNCTIONS

#### § 7.1. Injunction to Restrain Trespass

Where it was established that defendant's apartment building encroaches one square foot on plaintiff's land, and defendant is not a quasi-public entity, plaintiff is entitled to a mandatory injunction ordering removal of the encroachment. *Williams v. South & South Rentals*, 378.

### INSURANCE

#### § 27.1. Credit Life Insurance

A lender did not have the duty to disclose the availability of credit life insurance or the procedures for obtaining credit life insurance at the time of a loan transfer. *McMurray v. Surety Federal Savings & Loan Assoc.*, 729.

#### § 29. Life Insurance; Right to Proceeds

Plaintiff was not legally separated from her husband at the time of his death so as to bar her from receiving life insurance proceeds, though she was living separate and apart from him pursuant to a Temporary Protective Order under N.C.G.S. Chapter 50B. *Benfield v. Pilot Life Ins. Co.*, 293.

#### § 69. Automobile Insurance; Protection against Injury by Uninsured or Unknown Motorists Generally

The trial court erred by entering summary judgment for the administratrix of an estate for the full amount under the deceased's insurance policy where the deceased had been killed in an automobile accident in which the driver had been at fault and the deceased's policy required that coverage be limited by reducing the amount payable by all sums paid by anyone who was legally responsible. *Nationwide Mut. Ins. Co. v. Massey*, 448.

#### § 90. Automobile Liability Insurance; Limitations on Use of Vehicle

The trial court erred by granting summary judgment for defendants where the issue was whether a bob-tail insurance policy provided coverage. *Reeves v. B&P Motor Lines, Inc.*, 562.



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**INSURANCE — Continued****§ 95.1. Cancellation of Compulsory Automobile Liability Insurance; Notice to Insured**

An automobile liability insurer's mailing of a notice of cancellation to the last residence address provided by the insured complied with policy provisions requiring that notice of cancellation be mailed to the insured's "last known address." *Allstate Insurance Co. v. Nationwide Insurance Co.*, 366.

**§ 110. Automobile Liability Insurance; Payment**

Where the policy limit of \$25,000 for "all damages" for bodily injury sustained by one person in an accident was paid to the husband for his injuries, the wife's derivative claim for loss of consortium was encompassed within the \$25,000 limit. *South Carolina Ins. Co. v. White*, 122.

**§ 110.1. Automobile Liability Insurance; Payment; Liability for Interest**

The trial court erred in awarding prejudgment interest against defendant town rather than against the town's insurer. *McNabb v. Town of Bryson City*, 385.

**§ 122. Fire Insurance; Conditions and Forfeiture**

The evidence in an action under a fire insurance policy was insufficient to create a jury question as to the reasonableness of the times and places for the production of records by plaintiff. *Moore v. N.C. Farm Bureau Mut. Ins. Co.*, 616.

**§ 134. Fire Insurance; Persons Entitled to Payment**

Where a loss by fire was caused by the wrongful acts of defendant's husband, defendant as an innocent spouse was entitled to recover under a homeowner's policy one-half of the amount of the agreed loss left over after the mortgagees were paid. *Nationwide Mutual Fire Ins. Co. v. Pittman*, 756.

**JUDGMENTS****§ 1. Nature of Judgments Generally**

Since the wording of the body of a judgment controls and not the heading, the trial court in this case entered summary judgment rather than default judgment. *East Carolina Oil Transport v. Petroleum Fuel & Terminal Co.*, 746.

**§ 37.4. Res Judicata; Preclusion of Judgments in Particular Proceedings**

The doctrine of res judicata barred plaintiff's workers' compensation claim for disability based on seizures, headaches and dizzy spells where a similar claim had previously been denied because of plaintiff's failure to prove a causal connection to his injury by accident. *Stanley v. Gore Brothers*, 511.

**§ 55. Payment; Right to Interest**

The trial court erred in an action arising from an automobile collision by awarding prejudgment interest on the principal amount of the judgment, \$275,000, where defendant's liability insurance provided coverage up to \$50,000. *Wagner v. Barbee and Seiler v. Barbee*, 640.

**JURY****§ 7.14. Peremptory Challenges; Manner and Time of Exercising Challenge**

Defendant did not meet the required standard in arguing that the trial court erred by refusing to impanel a new jury after the State used peremptory challenges to remove all blacks. *S. v. Moorman*, 594.

## KIDNAPPING

### § 1.2. Sufficiency of Evidence

Variations among the victim's testimony and confessions of the two codefendants created discrepancies for the jury to resolve but did not warrant dismissal of a first degree kidnapping case. *S. v. Bullard*, 718.

## LABORERS' AND MATERIALMEN'S LIENS

### § 3. Lien of Subcontractor or Material Furnisher

G.S. 44A-18 does not require that the subcontractor claiming the lien personally deliver the materials to the building site. *Queensboro Steel Corp. v. East Coast Machine & Iron Works*, 182.

## LIMITATION OF ACTIONS

### § 5. Accrual of Cause of Action for Trespass

Plaintiff's action for permanent redress of defendant's unauthorized taking of plaintiff's land by its construction of an apartment building encroaching one square foot on plaintiff's land is governed by the twenty-year statute of limitations for adverse possession rather than the three-year statute of limitations for continuing trespass to realty. *Williams v. South & South Rentals*, 378.

### § 12.3. Commencement of Proceedings Generally; New Parties

An amendment to plaintiff's complaint adding defendant individually did not relate back to the filing of the original action and was barred by the statute of limitations. *Stevens v. Nimocks*, 350.

## MALICIOUS PROSECUTION

### § 13. Sufficiency of Evidence

The trial court erred by directing a verdict for defendant in an action for malicious prosecution. *Hitchcock v. Cullerton*, 296.

## MASTER AND SERVANT

### § 11. Trade Secrets; Solicitation of Former Employer's Customers

Plaintiff failed to show a reasonable apprehension of irreparable injury unless an injunction were granted restraining defendant, a former employee of plaintiff asbestos abatement contractor, from working for a competitor. *Masterclean of North Carolina v. Guy*, 45.

#### § 11.1. Competition with Former Employer

Provisions in a contract of employment that the employee would not work for another in competition with the employer in any city or town in the U.S. in which the employer is doing or has signified its intention of doing business are patently unreasonable as to territory, and the court had no authority to reform the contract by reducing the territory to five states. *Masterclean of North Carolina v. Guy*, 45.

### § 56. Workers' Compensation; Causal Relation between Employment and Injury

Plaintiff was not entitled to an award of workers' compensation where there was no evidence that her husband's death proximately resulted from a fall. *Pickrell v. Motor Convoy, Inc.*, 238.

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**MASTER AND SERVANT — Continued****§ 67. Workers' Compensation; Heart Failure**

The evidence supported a finding by the Industrial Commission that plaintiff's heart attack was not an injury by accident arising out of and in the course of his employment as an instrumentation fitter at a nuclear power plant. *Dillingham v. Yeargin Construction Co.*, 684.

**§ 68. Workers' Compensation; Occupational Diseases**

The evidence in a workers' compensation hearing was sufficient to support the Industrial Commission's finding that plaintiff suffered from bronchitis rather than from byssinosis. *Clark v. American & Efird Mills*, 192.

The Industrial Commission did not err by finding that a byssinosis plaintiff was exposed to some cotton dust but that there was no credible evidence as to the extent of plaintiff's exposure. *Knight v. Cannon Mills Co.*, 453.

The Industrial Commission's finding that plaintiff's lung disease was caused by factors unrelated to his occupation was supported by the evidence. *Ibid.*

The Industrial Commission did not err in a cotton dust case by failing to find facts on the issue of estoppel or by suppressing evidence relevant to estoppel. *Ibid.*

**§ 68.1. Workers' Compensation; Asbestosis**

The Industrial Commission erred in an asbestosis case by not applying the amended version of G.S. 97-58(a). *Long v. N. C. Finishing Co.*, 568.

G.S. 97-58(a) does not require proof of an injurious exposure as defined in G.S. 97-57. *Ibid.*

**§ 69. Workers' Compensation; Amount of Recovery Generally**

The Industrial Commission did not err by denying the employer a credit for compensation paid to the employee under a disability and sickness benefits plan separate from workers' compensation. *Foster v. Western Electric Co.*, 656.

The evidence did not support a finding by the Industrial Commission that plaintiff could collect under a company benefit plan both company disability benefits and workers' compensation benefits. *Ibid.*

**§ 73. Workers' Compensation; Loss of Specific Members**

Compensation was properly awarded for loss of smell and for damages to the nerves and muscles in the right side of plaintiff's face under provisions of G.S. 97-31(24) permitting compensation for loss or damage to an organ or important part of the body, and such compensation could be awarded without proof of diminished wage-earning capacity. *Stanley v. Gore Brothers*, 511.

**§ 73.1. Workers' Compensation; Loss of Vision**

The critical finding of the Industrial Commission that a witness testified only that the plaintiff's rubbing of his eye possibly could have caused his condition was not supported by competent evidence. *Jackson v. L.G. DeWitt Trucking Co.*, 208.

The Industrial Commission was required to make a specific finding as to whether plaintiff's vigorous rubbing of his eye after diesel fuel splashed in it significantly caused, aggravated, accelerated, or precipitated a hemorrhagic central retinal vein occlusion. *Ibid.*

**§ 91. Workers' Compensation; Filing of Claim Generally**

Plaintiff's claim for compensation for loss of smell and damage to facial nerves and muscles was not barred by res judicata or by the passage of time. *Stanley v. Gore Brothers*, 511.

**MASTER AND SERVANT — Continued****§ 94.2. Workers' Compensation; Award and Judgment of Commission**

The doctrine of res judicata barred plaintiff's workers' compensation claim for disability based on seizures, headaches and dizzy spells where a similar claim had previously been denied because of plaintiff's failure to prove a causal connection to his injury by accident. *Stanley v. Gore Brothers*, 511.

**§ 94.3. Workers' Compensation; Rehearing and Review by Commission**

Plaintiff's request to reopen her workers' compensation claim was made more than two years after the last payment of compensation and was properly denied. *Cook v. Southern Bonded, Inc.*, 277.

The court could not determine on appeal either that plaintiff showed grounds for reopening her case or that the Industrial Commission abused its discretion by declining to do so where there was no showing of additional evidence or why it had not been introduced at the original hearing. *Pickrell v. Motor Convoy, Inc.*, 238.

**§ 108. Right to Unemployment Compensation Generally**

A finding that claimant left work after being told that he would be terminated four days later does not support a conclusion that claimant left work voluntarily. *In re Poteat v. Employment Security Comm.*, 138.

**MORTGAGES AND DEEDS OF TRUST****§ 1. Definitions and Nature**

There was substantial evidence sufficient to support plaintiff's prima facie case that a transaction in fact constituted a mortgage rather than a deed and option to repurchase. *Rice v. Wood*, 318.

The trial court erred in an action in which plaintiffs alleged that a deed and option to repurchase constituted a mortgage by refusing to submit to the jury the factors of whether a debt existed between the parties and the conduct of the parties before and after the transaction. *Ibid.*

**MUNICIPAL CORPORATIONS****§ 30.11. Zoning; Specific Businesses or Structures**

An amendment to a zoning ordinance prohibiting further development of wet and dry boat storage at marinas was not unconstitutionally adopted. *In re Appeal of CAMA Permit*, 32.

**§ 30.20. Procedure for Enactment or Amendment of Zoning Ordinances**

The Town of Bath was not required to hold another public hearing on revisions to a proposed zoning ordinance or to refer the ordinance back to the Planning Board. *In re Appeal of CAMA Permit*, 32.

**§ 30.21. Procedure for Enactment or Amendment of Zoning Ordinances; Hearing**

Revisions to a zoning ordinance were not void for failure of the Town to follow its own procedural rules and those of N.C.G.S. § 160A, Art. 19. *In re Appeal of CAMA Permit*, 32.

**§ 30.22. Procedure for Enactment or Amendment of Zoning Ordinances; Judgment and Sufficiency of Evidence to Support Judgment**

The trial court's findings of fact supported its conclusion that ordinances restricting marinas were not arbitrarily aimed at petitioner. *In re Appeal of CAMA Permit*, 32.

**MUNICIPAL CORPORATIONS — Continued****§ 31. Judicial Review of Zoning Ordinances in General**

The question of whether the revocation of a CAMA permit was proper was rendered moot by the adoption of a revised zoning ordinance and the revocation of petitioner's certificate of compliance. *In re Appeal of CAMA Permit*, 32.

**§ 31.2. Scope and Extent of Judicial Review of Zoning Ordinance**

Petitioner could not raise for the first time on appeal the issue of whether he was prejudiced in a hearing concerning the revocation of a CAMA permit by the allowance of additional time for the Town to file documentary evidence and affidavits. *In re Appeal of CAMA Permit*, 32.

**NARCOTICS****§ 3.1. Competency of Evidence**

Evidence of the chain of custody was sufficient to support the conclusion that white powder analyzed by an SBI chemist was the same as that discovered by an officer in defendant's residence. *S. v. Teasley*, 150.

**§ 4. Sufficiency of Evidence**

There was no merit to defendant's contention in a prosecution for trafficking in cocaine that a large plastic bag of white powder was inadmissible because an officer mixed powder found elsewhere in the room with powder in the bag. *S. v. Teasley*, 150.

**§ 5. Punishment**

Defendant did not qualify for a reduction in his sentence for trafficking in cocaine based on his contention that the denial of his motion for continuance prohibited him from providing authorities with information on drug trafficking. *S. v. Teasley*, 150.

**§ 6. Forfeitures**

The trial court erred in a prosecution for trafficking in cocaine by ordering that \$5,900 found on defendant's person at the time of his arrest should be forfeited. *S. v. Teasley*, 150.

**NEGLIGENCE****§ 29.1. Particular Cases Where Evidence of Negligence Is Sufficient**

There was sufficient evidence of negligence and proximate cause to support a verdict for plaintiff in an action arising from the theft of jewelry from an automobile trunk where defendant's employee had given an unidentified caller the serial numbers of plaintiff's salesman's car keys. *Southern Watch Supply Co. v. Regal Chrysler-Plymouth*, 21.

**§ 53.5. Duty of Care Owed by Proprietor of Public Lake**

A subdivision association which employed a lifeguard to work at a designated swimming area of a lake was not liable for the death of a boy who drowned in the lake. *Prince v. Mallard Lakes Assn.*, 431.

**§ 57.6. Sufficiency of Evidence in Actions by Invitees; Foreign Matter on Floor**

Summary judgment in favor of defendant was inappropriate in an action to recover for injuries allegedly sustained by plaintiff when she stepped on a beer bottle while dancing in defendant's restaurant and dance hall. *Maddox v. Friday's, Inc.*, 145.

**NEGLIGENCE – Continued****§ 57.10. Sufficiency of Evidence in Actions by Invitees**

A genuine issue of material fact was presented as to whether defendant store owner was negligent in following its policy of locking only the "out" door upon the apprehension of a shoplifting suspect in the store so as to render the owner liable for injuries received by plaintiff when a shoplifting suspect fled through the open "in" door and knocked plaintiff to the ground. *Jones v. Lyon Stores*, 438.

**PARENT AND CHILD****§ 1.5. Procedure for Termination of Parental Rights**

A petition to terminate parental rights was valid even though it was brought individually by the director of the Department of Social Services. *In re Manus*, 340.

**§ 1.6. Procedure for Termination of Parental Rights; Sufficiency of Evidence**

The trial court did not err in denying respondent's motions for a directed verdict and for judgment n.o.v. in a proceeding to have a minor declared abandoned by his natural father. *In re Adoption of Searle*, 273.

The trial court properly considered a prior order finding neglect in a proceeding for termination of parental rights. *In re Stewart Children*, 651.

The evidence of neglect was sufficient to support an order terminating parental rights. *Ibid*.

**§ 2.3. Child Neglect**

The trial court's conclusion in a proceeding to terminate parental rights that respondents' children were neglected was not supported by the findings where the findings were based solely on past conditions. *In re Manus*, 340.

An order terminating parental rights in part upon the ground that respondent had failed to pay a reasonable portion of the costs of her children's care while they were in DSS custody was vacated where there were no findings as to respondent's ability to pay. *Ibid*.

**PARTNERSHIP****§ 6. Actions against Partners**

Defendant's motion for summary judgment based on the statute of limitations was properly granted in a malpractice action in which defendant was sued only as a member of a partnership. *Stevens v. Nimocks*, 350.

**PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS****§ 14. Burden of Proof in Actions for Malpractice**

There was no error in a medical malpractice action in which the trial court instructed the jury that plaintiff's burden was beyond the greater weight of the evidence where the court acknowledged its error and correctly reinstructed the jury. *Holiday v. Cutchin*, 660.

**§ 15.1. Malpractice; Expert Testimony**

There was no prejudice in a medical malpractice action from the court's failure to allow plaintiff's expert to testify on redirect examination that he knew of no circumstances that could have made it unnecessary for defendant to check the pulses in plaintiff's legs. *Holiday v. Cutchin*, 660.

## PROCESS

### § 6. Subpoena Duces Tecum

The trial court in a prosecution for taking indecent liberties did not err in quashing subpoenas duces tecum issued by defendant upon a children's home for the production of all its files and records relating to the victim and another witness, both of whom were residents of the home. *S. v. Newell*, 707.

### § 14.2. Service of Process on Foreign Corporation; Minimum Contacts Test

The demands of due process for jurisdiction over a foreign corporation were satisfied in that the lawsuit was based on a contract with substantial connections to North Carolina. *Collector Cars of Nags Head, Inc. v. G.C.S. Electronics*, 579.

### § 14.3. Service of Process on Foreign Corporation; Sufficiency of Evidence of Contacts; Contacts within this State

G.S. 55-145(a)(1) provided jurisdiction over a foreign corporation where a North Carolina corporation called from North Carolina and offered to purchase the product, and the written contract was executed in North Carolina. *Collector Cars of Nags Head, Inc. v. G.C.S. Electronics*, 579.

### § 14.4. Service of Process on Foreign Corporation; Sufficiency of Evidence of Contacts; Contract to Be Performed in this State

A promise to deliver goods to a carrier for shipment to North Carolina was sufficient to confer statutory jurisdiction under G.S. 1-75.4(5)(e). *Collector Cars of Nags Head, Inc. v. G.C.S. Electronics*, 579.

## PUBLIC OFFICERS

### § 10. Personal Liability of Public Officers to the Public

Citizens and taxpayers have no standing to bring an action against a former governor to recover damages for the alleged misuse of State aircraft while in office. *Flaherty v. Hunt*, 112.

## QUASI CONTRACTS AND RESTITUTION

### § 1.1. Effect of Express Contract on Right of Action

The trial court erred in an action arising from the purchase of a farm by defendants and the operation of the farm by plaintiffs by denying defendants' motions for a directed verdict and for judgment n.o.v. where plaintiffs admitted in their brief the existence of a special agreement between the parties, which defeats a claim for implied contract. *Britt v. Britt*, 303.

### § 1.2. Unjust Enrichment

The trial court erred in an action arising from the purchase of a farm by defendants and the operation of the farm by plaintiffs by denying defendants' motions for a directed verdict and for judgment n.o.v. where plaintiffs contended that the facts gave rise to quantum meruit but plaintiffs' proof of value unjustly retained and realized by defendants was defective. *Britt v. Britt*, 303.

## RAPE AND ALLIED OFFENSES

### § 3. Indictment

The trial court erred by denying defendant's motion to dismiss a charge of second degree rape where the indictment alleged force and the evidence tended to show that the prosecutrix fell asleep and awoke to find a male on top of her engaging in sexual intercourse. *S. v. Moorman*, 594.

**RAPE AND ALLIED OFFENSES — Continued****§ 5. Sufficiency of Evidence**

The evidence of second degree sexual offense was sufficient to withstand a motion to dismiss. *S. v. Moorman*, 594.

Variations among the victim's testimony and confessions of the two codefendants created discrepancies for the jury to resolve but did not warrant dismissal of a first degree rape case. *S. v. Bullard*, 718.

The trial court did not err in allowing inconsistent jury verdicts finding the codefendant not guilty of kidnapping or first degree rape while finding defendant guilty of second degree rape. *Ibid*.

**RECEIVERS****§ 12.1. Costs of Administration**

The trial court did not err in approving receivership fees and expenses without allocating the various expenses among the seven corporate defendants where the court's order is not a final judgment. *Lowder v. All Star Mills, Inc.*, 470.

**REGISTRATION****§ 5. Parties Protected by Registration**

A wife who joined her husband in the execution of a deed of trust to plaintiff merely to release her marital interest was not a "party" to the deed of trust within the purview of the "between parties" exception to the recording statute for deeds of trust, and a subsequent deed of trust on the same property executed by the husband to the wife which was recorded before recordation of the deed of trust to plaintiff had priority over the deed of trust to plaintiff. *Schiller v. Scott*, 90.

A wife to whom a husband executed a deed of trust did not lose her protected lien creditor status under G.S. 47-20 because she was a witness to a prior deed of trust on the same property from the husband to plaintiff which was recorded after recordation of the deed of trust to the wife. *Ibid*.

**RULES OF CIVIL PROCEDURE****§ 13. Counterclaims**

The trial court properly dismissed an action against a financial advisor where the plaintiff's claims were compulsory counterclaims in defendants' action against plaintiff. *Brooks v. Rogers*, 502.

**§ 15.1. Discretion of Court to Grant Amendment of Pleadings**

There was no clear abuse of discretion in the denial of a pretrial motion to amend a complaint. *Tyson v. Ciba-Geigy Corp.*, 626.

**§ 15.2. Amendment of Pleadings to Conform to the Evidence**

Plaintiff's contention that the court erred by granting a directed verdict in an action arising from representations by defendant's real estate agent must be considered on the pleaded grounds of mutual mistake rather than fraud where the evidence which supported a claim for fraud was also relevant to the issue of mutual mistake. *Howell v. Waters*, 481.

The trial court did not err by denying plaintiff's motion to amend his complaint to allege negligence and conform the pleadings to the evidence. *Tyson v. Ciba-Geigy Corp.*, 626.



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**RULES OF CIVIL PROCEDURE — Continued****§ 24. Intervention**

A party who intervenes pursuant to Rule 24 is not required to issue a summons and complaint. *In re Baby Boy Shamp*, 606.

**§ 41. Dismissal of Actions Generally**

The trial court properly refused to grant defendant's motion for involuntary dismissal at the close of plaintiff's evidence in a non-jury trial. *Estee Co. v. Goodman*, 692.

**§ 41.1. Voluntary Dismissal**

An order dismissing a refiled action was vacated where the order had granted a voluntary dismissal without the consent of the counterclaiming defendant. *Smith v. Williams*, 672.

**§ 56. Summary Judgment**

The trial court did not err in granting summary judgment for defendant where an entry of default established certain items as proven facts, and the court also considered answers to interrogatories, responses to requests for admissions, and replies to requests for the production of documents. *East Carolina Oil Transport v. Petroleum Fuel & Terminal Co.*, 746.

**§ 60. Relief from Judgment**

The trial court properly denied plaintiff's motion for relief from judgment where plaintiff's counsel admitted he requested important information from plaintiff but plaintiff did not produce the information until after the time for filing a response to defendant's counterclaim and after the hearing on defendant's motion for summary judgment. *East Carolina Oil Transport v. Petroleum Fuel & Terminal Co.*, 746.

**SALES****§ 17.1. Sufficiency of Evidence in Cases Involving Express Warranties**

The evidence was not sufficient to show that defendant breached an express warranty on a herbicide. *Tyson v. Ciba-Geigy Corp.*, 626.

The statement of a salesman that a herbicide would do a good job when mixed with other chemicals was a mere expression of opinion. *Ibid.*

**§ 17.2. Sufficiency of Evidence in Cases Involving Warranties of Merchantability**

Defendant effectively disclaimed the implied warranty of merchantability on its herbicide where the disclaimer on its label mentioned merchantability and was in darker and larger type than the other language on the label and was therefore conspicuous. N.C.G.S. § 25-1-201(10), N.C.G.S. § 25-2-316(2). *Tyson v. Ciba-Geigy Corp.*, 626.

The trial court erred by granting a directed verdict for defendant in an action based on statements of defendant's employee regarding the effectiveness of a herbicide. *Ibid.*

**SEARCHES AND SEIZURES****§ 11. Search and Seizure on Probable Cause; Search and Seizure of Vehicles**

The trial court did not err in a prosecution for armed robbery by admitting into evidence a pistol, marked currency, and a white sweater worn during a rob-

### SEARCHES AND SEIZURES — Continued

bery, all of which were seized from defendant's person or his automobile. *S. v. Alston*, 372.

The warrantless search of defendant's automobile after it was removed to a police station was justified. *S. v. White*, 358.

#### § 18. Consent to Search by Vehicle Owner

An officer was justified in stopping defendant for a traffic violation, and the officer lawfully seized burglary tools found in the car driven by defendant in a search conducted with the consent of defendant and the owner of the car. *S. v. Roberts*, 733.

#### § 20. Application for Warrant; Requisites of Affidavit Generally

The issuance of a search warrant must rest solely on an officer's affidavit where the evidence did not show that the magistrate recorded or contemporaneously summarized in the record the officer's oral statements to her. *S. v. Teasley*, 150.

#### § 23. Application for Warrant; Sufficiency of Showing Probable Cause

The trial court did not err in denying defendant's motion to suppress evidence seized during a search of his house where an affidavit provided the magistrate with a substantial basis for concluding that there was probable cause to believe that evidence of a crime would be discovered in defendant's house. *S. v. Teasley*, 150.

#### § 34. Items which May Be Searched for and Seized; Plain View Rule; Search of Vehicle

A police officer's observation of stereo equipment in an automobile and his investigation of the driver's license number marked on the equipment was not so sufficiently intrusive as to amount to a constitutionally impermissible search of defendant's automobile. *S. v. White*, 358.

### SOCIAL SECURITY AND PUBLIC WELFARE

#### § 1. Generally

The treatment of an income tax refund as a resource in determining AFDC eligibility while treating an income tax refund as income in determining AFDC-medically needy eligibility violates the same methodology requirement of the federal Medicaid statute. *Thorne v. N.C. Dept. of Human Resources*, 548.

#### § 2. Recovery of Amount Paid to Recipient

The trial court properly denied a motion to intervene to seek retroactive child support filed by the child's grandmother, with whom the child had lived since shortly after her birth, where the Pender County Child Support Enforcement Agency and the child's father had entered into a proposed settlement which included public assistance arrearages and the grandmother had accepted AFDC benefits on behalf of the minor child. *State ex rel. Crews v. Parker*, 419.

### STATE

#### § 2.2. State Buildings

The trial court erred in concluding as matter of law that plaintiff was contractually liable to the State for damage to the interior of a building sustained during a rainfall after some unknown third person walked on and damaged a temporary roof installed by plaintiff at the State's direction. *E. L. Scott Roofing Co. v. State of N. C.*, 216.

## STATE — Continued

## § 5. Nature and Construction of Tort Claims Act in General

A decision by defendant DOT not to erect a guardrail along an embankment was not negligence entitling plaintiff to recover for the deaths of her two daughters whose car hit a patch of ice and fell down the embankment. *Hochheiser v. N. C. Dept. of Transportation*, 712.

## STATUTES

## § 5.5. General Rules of Construction; Clear and Unambiguous Provisions

The superior court correctly ruled that the Insurance Commissioner's decision to require a proposed high-rise building to be provided with emergency generator power for fans in areas in addition to elevator shafts, stairways, and areas of refuge was affected by an error of law. *In re Appeal of Medical Center*, 414.

## TAXATION

## § 18. Intangibles Taxes

A trust is entirely exempt from intangibles taxation only if all of the net income is distributed to nonresidents or if the only potential beneficiaries are nonresidents. *NCNB v. Powers*, 540.

## § 25.4. Ad Valorem Taxes; Valuation and Assessment

A power company's introduction of a study showing that Guilford County appraised locally assessed real property at 80.12% of true market value for 1983 established a prima facie case of "inequitable difference" between the level of assessment of local appraised property in Guilford County and the level of the 1983 assessment of the power company's property in Guilford County at 100% of fair market value by the Department of Revenue, and the burden shifted to Guilford County to rebut the evidence as to real property and to come forward with evidence as to the assessment levels for personal property. *In re Appeal of Duke Power Co.*, 492.

## TRESPASS

## § 3. Continuing Trespass and Limitation of Actions

Plaintiff's action for permanent redress of defendant's unauthorized taking of plaintiff's land by its construction of an apartment building encroaching one square foot on plaintiff's land is governed by the twenty-year statute of limitations for adverse possession rather than the three-year statute of limitations for continuing trespass to realty. *Williams v. South & South Rentals*, 378.

## TROVER AND CONVERSION

## § 4. Measure of Damages

The evidence was sufficient to support the trial court's determination of the fair market value of a crane at the time it was converted by defendant. *Esteel Co. v. Goodman*, 692.

## TRUSTS

## § 13. Creation of Resulting Trusts

A resulting trust was unavailable where plaintiffs' evidence tended to show undue influence by defendant. *Brisson v. Williams*, 53.

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**TRUSTS — Continued****§ 14.2. Creation of Constructive Trusts; Transactions Involving an Acquisition on or by Breach of Confidence**

Plaintiffs' forecast of evidence presented an issue of material fact as to whether defendant committed constructive fraud based on breach of a confidential relationship of husband and wife entitling plaintiffs to the impression of a constructive trust on property conveyed by plaintiffs' father to himself and defendant as tenants by the entirety. *Brisson v. Williams*, 53.

**§ 15. Action to Establish Constructive Trust; Limitations**

A genuine issue of material fact was presented as to when plaintiffs had notice that defendant was claiming the subject property adversely to them so as to commence the running of the statute of limitations against their claim for impression of a constructive trust on the property. *Brisson v. Williams*, 53.

**UNFAIR COMPETITION****§ 1. Unfair Trade Practices in General**

The trial court did not err in an action under a fire insurance policy by granting defendant's motion for a directed verdict on plaintiff's unfair trade practices claim. *Moore v. N.C. Farm Bureau Mut. Ins. Co.*, 616.

Evidence sufficient to support a claim of constructive fraud against real estate brokers was also sufficient to support an unfair or deceptive trade practice claim. *Spence v. Spaulding and Perkins, Ltd.*, 665.

**UNIFORM COMMERCIAL CODE****§ 23. Buyer's Remedies; Right to Revoke Acceptance of Goods**

The appellate court could not determine because of inadequate findings and conclusions whether a judgment awarding full recovery on a note was correct. *Wohlfahrt v. Schneider*, 69.

**§ 45. Default and Enforcement of Security Interest**

The fact that a defendant in an action on a note and security agreement had not defaulted in payment at the time the suit was commenced did not necessarily defeat plaintiffs' claim. *Wohlfahrt v. Schneider*, 69.

**VENDOR AND PURCHASER****§ 1.4. Exercise of Option**

The trial court properly concluded that an option to purchase a crane was never exercised and that defendant's sale of the crane therefore constituted a conversion. *Esteel Co. v. Goodman*, 692.

**§ 2. Time of Performance**

The trial court erred by directing a verdict for plaintiffs in an action for the specific performance of a real estate contract. *Furr v. Carmichael*, 634.

**§ 5. Specific Performance**

Plaintiffs were entitled to specific performance in their action to require defendant to build a boat basin, access channel, and paved access road. *Lyerly v. Malpass*, 224.

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**VENDOR AND PURCHASER — Continued****§ 11. Abandonment and Cancellation of Contract**

The trial court erred by directing defendants to specifically perform a contract to convey real estate. *Beeson v. McDonald*, 669.

**WITNESSES****§ 1. Competency**

The trial court in a caveat proceeding did not err by considering on voir dire the records of a proposed witness's commitment proceedings. *In re Will of Leonard*, 646.

The trial judge did not abuse her discretion in a caveat proceeding by finding that a witness was incapable of remembering, understanding, and relating to the jury matters of detail concerning a holographic will. *Ibid*.

## WORD AND PHRASE INDEX

### ABANDONMENT

Insufficient evidence, *O'Herron v. Jer-*  
*son*, 434.

### ABATEMENT

Pending action in Texas, *Wohlfahrt v.*  
*Schneider*, 69.

### ACCOUNT STATED

Payment for renovation work, *Woodruff*  
*v. Shuford*, 260.

### AD VALOREM TAXES

Inequitable difference in valuation of  
power company's property, *In re Ap-*  
*peal of Duke Power Co.*, 492.

### ADOPTION

Consent obtained by fraud, *In re Baby*  
*Boy Shamp*, 606.

Intervention by natural parents, *In re*  
*Baby Boy Shamp*, 606.

### AFDC

Treatment of income tax refund,  
*Thorne v. N. C. Dept. of Human Re-*  
*sources*, 548.

### AGGRAVATING FACTORS

Great monetary loss based on medical  
expenses, *S. v. Newton*, 555.

Heinous, atrocious or cruel assault, evi-  
dence sufficient, *S. v. Poole*, 117; evi-  
dence insufficient, *S. v. Newton*, 555.

Manner of proving prior convictions, *S.*  
*v. Morgan*, 674.

Victim's physical infirmity, *S. v. New-*  
*ton*, 555.

### AIRCRAFT

Alleged misuse by former governor,  
*Flaherty v. Hunt*, 112.

### AMPUTATED LEG

Blood clot, *Holiday v. Cutchin*, 660.

### APARTMENT BUILDING

Encroachment on plaintiff's land, *Wil-*  
*liams v. South & South Rentals*, 378.

### APPEAL

As pauper denied, *Atlantic Ins. & Real-*  
*ty Co. v. Davidson*, 251.

From interlocutory orders, *S. v. Sieg-*  
*fried Corp.*, 678.

Partial summary judgment, *Schuch v.*  
*Hoke*, 445.

### ARMED ROBBERY

Conviction with larceny as double jeop-  
ardy, *S. v. Hurst*, 1.

Prosecutor's jury argument, *S. v.*  
*Hurst*, 1.

### ARREST

Checking license, *S. v. Badgett*, 270.

### ASBESTOS CONTRACTOR

Covenant not to compete, *Masterclean*  
*of North Carolina v. Guy*, 45.

### ASBESTOSIS

Amended statute, *Long v. N. C. Finish-*  
*ing Co.*, 568.

Injurious exposure, *Long v. N. C. Fin-*  
*ishing Co.*, 568.

### ASSAULT

Evidence sufficient, *S. v. Poole*, 117.  
On fireman, *S. v. Teasley*, 150.

### ASSIGNMENT

Right to C.O.D. payment, *Gunby v.*  
*Pilot Freight Carriers, Inc.*, 427.

**ATTORNEYS**

Appropriation of client's funds, *N. C. State Bar v. Whitted*, 531.

Conflict of interest with multiple clients, *N. C. State Bar v. Whitted*, 531.

Motions to replace appointed counsel, *S. v. Hurst*, 1.

**ATTORNEYS' FEES**

Awarded in shareholder derivative action, *Lowder v. All Star Mills, Inc.*, 470.

Findings as to reasonableness of rates, *Peak v. Peak*, 700.

Merit bonus, *Lowder v. All Star Mills, Inc.*, 470.

**AUTOMOBILE**

Collision with motorcycle, *Wagner v. Barbee and Seiler v. Barbee*, 640.

Consent to search, *S. v. Roberts*, 733.

Duty to maintain proper lookout, *Masciulli v. Tucker*, 200.

Officer's opinion of how accident occurred, *Wagner v. Barbee and Seiler v. Barbee*, 640.

Sudden emergency, *Masciulli v. Tucker*, 200.

Warrantless search at police station, *S. v. White*, 358.

Warrantless stop and frisk search, *S. v. Alston*, 372.

Wet pavement, *Masciulli v. Tucker*, 200.

**AUTOMOBILE INSURANCE**

Bob-tail, *Reeves v. B&P Motor Lines, Inc.*, 562.

Loss of consortium claim, *South Carolina Ins. Co. v. White*, 122.

Notice of cancellation to last known address, *Allstate Insurance Co. v. Nationwide Insurance Co.*, 366.

Two insurers, *Nationwide Mut. Ins. Co. v. Massey*, 448.

**BANK ROBBERY**

Tried in state and federal court, *S. v. Myers*, 299.

**BASEBALL BAT**

Homicide, *S. v. Hughes*, 724.

**BEACH ACCESS**

Restrictive covenants, *White v. Town of Emerald Isle*, 392.

**BEER BOTTLE**

Causing fall on dance floor, *Maddox v. Friday's, Inc.*, 145.

**BINGO**

Two sessions within 48 hours, *Durham Highway Fire Protection Assoc. v. Baker*, 583.

**BLOOD ALCOHOL LEVEL**

Opinion of doctor, *Wagner v. Barbee and Seiler v. Barbee*, 640.

**BLOOD CLOT**

Medical malpractice, *Holiday v. Cutchin*, 660.

**BOB-TAIL INSURANCE**

Leased truck, *Reeves v. B&P Motor Lines, Inc.*, 562.

**BREAKING OR ENTERING**

Consensual sexual intercourse, *Kinney v. Baker*, 126.

**BUILDING CODE**

Interpretation by insurance commissioner, *In re Appeal of Medical Center*, 414.

**BURGLARY**

Insufficient evidence of intent to commit felony, *S. v. Humphries*, 749.

**BYSSINOSIS**

- Cigarette consumption, *Knight v. Cannon Mills Co.*, 453.  
Denial of compensation, *Clark v. American & Efird Mills*, 192.  
Extent of exposure, *Knight v. Cannon Mills Co.*, 453.

**CAR KEYS**

- Serial number revealed to thief by dealer, *Southern Watch Supply Co. v. Regal Chrysler-Plymouth*, 21.

**CAVEAT PROCEEDING**

- Incompetency of witness, *In re Will of Leonard*, 646.

**CHAIN OF CUSTODY**

- White powder, *S. v. Teasley*, 150.

**CHILD CUSTODY**

- Changed circumstances, *Woncik v. Woncik*, 244.  
False testimony by child, *Vuncannon v. Vuncannon*, 255.  
Mother's alienation of child's affection for father, *Woncik v. Woncik*, 244.  
Testimony by child psychiatrist, *Woncik v. Woncik*, 244.  
Visitation, *Woncik v. Woncik*, 244.

**CHILD SUPPORT**

- Arrearages, *Adkins v. Adkins*, 289.  
Contempt, *Adkins v. Adkins*, 289.  
Equitable estoppel, *Adkins v. Adkins*, 289.  
No refund of lump sum payment upon change of custody, *Reavis v. Reavis*, 77.  
Reduction of, *Bottomley v. Bottomley*, 231.  
Separation agreement, *Bottomley v. Bottomley*, 231.  
Statute of limitations, *Adkins v. Adkins*, 289.

**CHILD VISITATION**

- Interference as change of circumstances, *Woncik v. Woncik*, 244.

**C.O.D. PAYMENT**

- Assignment of, *Gunby v. Pilot Freight Carriers, Inc.*, 427.  
Failure to collect, *Gunby v. Pilot Freight Carriers, Inc.*, 427.

**COLLATERAL ESTOPPEL**

- Earlier acquittal, *S. v. Alston*, 372.

**COLLEGE EXPENSES**

- Oral modification of separation agreement, *Altman v. Munns*, 102.

**COMPLAINT**

- Amendment to conform to evidence denied, *Tyson v. Ciba-Geigy Corp.*, 626.

**CONDEMNATION**

- For public park, *City of Charlotte v. Rouso*, 588.  
Value of property, *Dept. of Trans. v. Byrum*, 96.

**CONFESSION**

- Codefendant's, *S. v. Roberts*, 733.  
Voluntariness, *S. v. Bullard*, 718.

**CONFLICT OF LAWS**

- Note and security agreement, *Wohlfahrt v. Schneider*, 69.

**CONSTRUCTIVE TRUSTS**

- Breach of confidential relationship of husband and wife, *Brisson v. Williams*, 53.

**CONTINUANCE**

- To prepare defense denied, *S. v. Teasley*, 150; *S. v. Newell*, 707.



**CONTRIBUTORY NEGLIGENCE**

Riding with intoxicated driver, *Kinney v. Baker*, 127; *Baker v. Mauldin*, 404.

**COUNTERCLAIM**

Compulsory, *Brooks v. Rogers*, 502.

Dismissal of original action, *Smith v. Williams*, 672.

Not answered, *East Carolina Oil Transport v. Petroleum Fuel & Terminal Co.*, 746.

**COVENANT NOT TO COMPETE**

Asbestos abatement contractor, *Masterclean of North Carolina v. Guy*, 45.

**CRANE**

Conversion of, *Esteel Co. v. Goodman*, 692.

**CREDIT LIFE INSURANCE**

Availability of, no duty by lender, *McMurray v. Surety Federal Savings & Loan Assoc.*, 729.

**CRIMINAL CITATION**

Admission to show intoxication, *Wagner v. Barbee and Seiler v. Barbee*, 640.

**DANCE FLOOR**

Fall caused by beer bottle on, *Maddox v. Friday's, Inc.*, 145.

**DEED**

And option to repurchase, *Rice v. Wood*, 318.

Certification, *West v. Hays*, 574.

Lunatic grantor, *Peterson v. Finger*, 743.

Private examination of wife, *West v. Hays*, 574.

**DEED OF TRUST**

Wife's joinder to release marital interest, applicability of recordation statute, *Schiller v. Scott*, 90.

**DEVELOPER**

Promised amenities, *Lyerly v. Malpass*, 224.

**DIESEL FUEL**

Splashed in eye, *Jackson v. L. G. DeWitt Trucking Co.*, 208.

**DISBARMENT**

Appropriation of client funds, *N. C. State Bar v. Whitted*, 531.

**DOUBLE JEOPARDY**

Armed robbery and felonious larceny, *S. v. Hurst*, 1.

State and federal trial, *S. v. Myers*, 299.

**DRIVING WHILE IMPAIRED**

Limited driving privilege denied, *S. v. Harper*, 398.

Two breathalyzer tests, *S. v. Harper*, 398.

Waiver of rights, *S. v. Harper*, 398.

**DROWNING**

Subdivision association not liable for, *Prince v. Mallard Lakes Assn.*, 431.

**DUAL 8E**

Breach of warranty, *Tyson v. Ciba-Geigy Corp.*, 626.

**DUKE POWER COMPANY**

Inequitable difference in valuation of property for taxes, *In re Appeal of Duke Power Co.*, 492.

**DUST**

Reduced visibility from, *Allen v. Pullen*, 61.

**EFFECTIVE ASSISTANCE  
OF COUNSEL**

Ineffective assistance not prejudicial, *S. v. Moorman*, 594.

**EMINENT DOMAIN**

Regrading to improve access, *Dept. of Transportation v. Higdon*, 752.

**ENCROACHMENT**

Apartment building on plaintiff's land, *Williams v. South & South Rentals*, 378.

**EQUITABLE DISTRIBUTION**

Appreciation of funds, *Peak v. Peak*, 700.

Appreciation of real property, *Swindell v. Lewis*, 423.

Award of stock, *Conrad v. Conrad*, 758.

Contempt, *Conrad v. Conrad*, 758.

Defendant died while action pending, *Swindell v. Lewis*, 423.

Husband's tools, *Draughon v. Draughon*, 738.

Interest in cemetery, *Hartman v. Hartman*, 167.

Lake house, *Hartman v. Hartman*, 167.

Pension rights, *Seifert v. Seifert*, 329; *Peak v. Peak*, 700.

Savings account, *Peak v. Peak*, 700.

Sole proprietorship of husband, *Draughon v. Draughon*, 738.

Valuation of stock, *Hartman v. Hartman*, 167.

Wife's inheritance, *Draughon v. Draughon*, 738.

**EXCUSABLE NEGLECT**

No showing of, *East Carolina Oil Transport v. Petroleum Fuel & Terminal Co.*, 746.

**EXPERT WITNESSES**

Denial of for criminal defendant, *S. v. Newton*, 555.

Opinion as to credibility of victim, *S. v. Holloway*, 586.

**FAIR MARKET VALUE**

Conversion of crane, *Esteel Co. v. Goodman*, 692.

**FAIR SENTENCING ACT**

No aggravating or mitigating factors found, *S. v. Newell*, 707.

**FANS**

Required by building code, *In re Appeal of Medical Center*, 414.

**FARM**

Purchase and operation of, *Britt v. Britt*, 303.

**FINANCIAL ADVISOR**

Counterclaim against, *Brooks v. Rogers*, 502.

**FIRE INSURANCE**

Production of records by claimant, *Moore v. N. C. Farm Bureau Mut. Ins. Co.*, 616.

Wife's rights where property burned by husband, *Nationwide Mutual Fire Ins. Co. v. Pittman*, 756.

**FOREIGN CORPORATION**

Jurisdiction, *Collector Cars of Nags Head, Inc. v. G.C.S. Electronics*, 579.

**FRAUD**

Agreement to accrue stock, *Britt v. Britt*, 303.

Punitive damages, *S. v. Siegfried Corp.*, 678.

**GOVERNOR HUNT**

Alleged misuse of state aircraft, *Flaherty v. Hunt*, 112.

**GROCERY STORE**

Customer's injury by shoplifting suspect, *Jones v. Lyon Stores*, 438.

**GUARANTY**

Hospital patient's sister, *Forsyth Co. Hospital Authority, Inc. v. Sales*, 265.

**GUARDRAIL**

Decision not to erect, *Hochheiser v. N. C. Dept. of Transportation*, 712.

**HABITUAL FELON**

Treated as substantive offense for sentencing, *S. v. Thomas*, 682.

**HEART ATTACK**

Workers' compensation, *Dillingham v. Yeargin Construction Co.*, 684.

**HERBICIDE**

Breach of warranty, *Tyson v. Ciba-Geigy Corp.*, 626.

**HOLOGRAPHIC WILL**

Caveat, incompetency of witness, *In re Will of Leonard*, 646.

**HOSPITAL**

Failure to make direct nurse-patient assignments, *Griggs v. Morehead Memorial Hospital*, 131.

Liability of patient for services, *Forsyth Co. Hospital Authority, Inc. v. Sales*, 265.

**HOUSEBREAKING TOOLS**

Possession of, *S. v. Roberts*, 733.

**IMPLIED WARRANTY OF  
MERCHANTABILITY**

Disclaimer effective, *Tyson v. Ciba-Geigy Corp.*, 626.

**INCOME APPROACH**

Not allowed for property valuation, *Dept. of Trans. v. Byrum*, 96.

**INCOME TAX REFUND**

Treatment for AFDC purposes, *Thorne v. N. C. Dept. of Human Resources*, 548.

**INDECENT LIBERTIES  
WITH A CHILD**

Testimony that victim truthful, *S. v. Holloway*, 586.

**INMATE**

Confiscation of funds, *In re Petition of Kermit Smith*, 107.

**INSURANCE COMMISSIONER**

Interpretation of building code, *In re Appeal of Medical Center*, 414.

**INTERLOCUTORY ORDERS**

Appeal from, *S. v. Siegfried Corp.*, 678.

**INTERVENTION**

In child support action by grandmother, *State ex rel. Crews v. Parker*, 419.

**INTOXICATION**

Voluntary, refusal to instruct in robbery case, *S. v. Hurst*, 1.

**INVOLUNTARY DISMISSAL**

Discretion of court, *Esteel Co. v. Goodman*, 692.

**JEWELRY**

Stolen from automobile trunk, *Southern Watch Supply Co. v. Regal Chrysler-Plymouth*, 21.

**JUDGMENT**

Wording of body controlling, *East Carolina Oil Transport v. Petroleum Fuel & Terminal Co.*, 746.

**JURISDICTION**

Contract made in North Carolina, *Collector Cars of Nags Head, Inc. v. G.C.S. Electronics*, 579.

Promise to deliver goods for shipment to North Carolina, *Collector Cars of Nags Head, Inc. v. G.C.S. Electronics*, 579.

**KIDNAPPING**

Evidence sufficient, *S. v. Bullard*, 718.

**LAKE**

Subdivision association not liable for drowning in, *Prince v. Mallard Lakes Assn.*, 431.

**LARCENY**

Conviction with robbery as double jeopardy, *S. v. Hurst*, 1.

**LIABILITY INSURANCE**

See Automobile Insurance this Index.

**LIEN**

Subcontractors, *Queensboro Steel Corp. v. East Coast Machine & Iron Works*, 182.

**LIFE INSURANCE**

Wife living apart under protective order, right to proceeds, *Benfield v. Pilot Life Ins. Co.*, 293.

**LIFEGUARD**

Employment at lake by subdivision association, *Prince v. Mallard Lakes Assn.*, 431.

**LIMITED DRIVING PRIVILEGE**

Stop to check, *S. v. Badgett*, 270.

**LOSS OF CONSORTIUM**

Automobile liability insurance limits, *South Carolina Ins. Co. v. White*, 122.

**MALICIOUS PROSECUTION**

Communicating threats, *Hitchcock v. Cullerton*, 296.

**MARINAS**

Zoning restrictions, *In re Appeal of CAMA Permit*, 32.

**MEDICAL EQUIPMENT**

Note and security agreement, *Wohlfahrt v. Schneider*, 69.

**MEDICAL MALPRACTICE**

Instruction on burden of proof, *Holiday v. Cutchin*, 660.

Pulses in painful leg, *Holiday v. Cutchin*, 660.

**MENTAL INCOMPETENCE**

Of grantor, *Peterson v. Finger*, 743.

**MERIT BONUS**

Attorneys in shareholder derivative action, *Lowder v. All Star Mills, Inc.*, 470.

**MILITARY MEDICAL RECORDS**

Inadmissibility in accident case, *McNabb v. Town of Bryson City*, 385.

**MINIMUM CONTACTS**

Foreign corporation, *Collector Cars of Nags Head, Inc. v. G.C.S. Electronics*, 579.

**MISTRIAL**

Emotional outburst of victim, *S. v. Newton*, 555.

**MONEY**

Forfeiture by narcotics defendant, *S. v. Teasley*, 150.

**MORTGAGE**

Rather than deed and option to repurchase, *Rice v. Wood*, 318.

**MOTORCYCLIST**

Collision with police car, *McNabb v. Town of Bryson City*, 385.

**NEGLIGENCE**

Serial number of car keys revealed by dealer, *Southern Watch Supply Co. v. Regal Chrysler-Plymouth*, 21.

**NEWLY DISCOVERED EVIDENCE**

Motion for appropriate relief, *S. v. Newell*, 707.

**NOTE AND SECURITY AGREEMENT**

Acceptance of goods, *Wohlfahrt v. Schneider*, 69.

Default, *Wohlfahrt v. Schneider*, 69.

**ODOMETER STATEMENT**

False, *McCracken v. Anderson Chevrolet-Olds, Inc.*, 521.

**OPINION**

That child testified truthfully, *S. v. Holloway*, 586.

**OPTION TO PURCHASE**

Crane, *Estee Co. v. Goodman*, 692.

**OTHER OFFENSES**

Admissibility to show identity, *S. v. Williams*, 281.

Admission harmless error, *S. v. White*, 358.

**PARK**

Condemnation for, *City of Charlotte v. Rouso*, 588.

**PAROLE**

Consecutive sentence not stated in judgment, *S. v. Warren*, 84.

Revocation, *S. v. Warren*, 84.

Waiver of counsel at revocation hearing, *S. v. Warren*, 84.

**PARTNERSHIP**

Individual liability, *Stevens v. Nimocks*, 350.

**PAUPER**

Appeal as, *Atlantic Ins. & Realty Co. v. Davidson*, 251.

**PEDIATRICIAN**

Opinion that child testified truthfully, *S. v. Holloway*, 586.

**PENSION RIGHTS**

Equitable distribution, *Seifert v. Seifert*, 329; *Peak v. Peak*, 700.

**PEREMPTORY CHALLENGE**

Removal of blacks, *S. v. Moorman*, 594.

**PHOTOGRAPHIC IDENTIFICATION**

Admissible, *S. v. Morgan*, 674.

**POLICE REPORT**

Admissible in negligence action, *Southern Watch Supply Co. v. Regal Chrysler-Plymouth*, 21.

**PREJUDGMENT INTEREST**

Defendant partially insured, *Wagner v. Barbee and Seiler v. Barbee*, 640.

**PRELIMINARY INJUNCTION**

Right of appeal, *Masterclean of North Carolina v. Guy*, 45.

**PRESUMPTIVE SENTENCE**

No findings, *S. v. Teasley*, 150.

**PRETRIAL IDENTIFICATION**

Findings on admissibility, *Kinney v. Baker*, 126.

**PRIOR CRIMINAL RECORD**

Discovery, *S. v. Teasley*, 150.

**PRISONER**

Confiscation of excess funds, *In re Petition of Kermit Smith*, 107.

**PRIVATE EXAMINATION  
OF WIFE**

Deed, *West v. Hays*, 574.

**PRIVATE INVESTIGATOR**

Licensing of, *Shipman v. N. C. Private Protective Services Bd.*, 441.

**PROPERTY TAXES**

Inequitable valuation of power company's property, *In re Appeal of Duke Power Co.*, 492.

**PSYCHOLOGIST**

Opinion that child testified truthfully, *S. v. Holloway*, 586.

**PUBLIC ASSISTANCE**

Effect of acceptance, *State ex rel. Crews v. Parker*, 419.

Settlement of arrearages, *State ex rel. Crews v. Parker*, 419.

**QUANTUM MERUIT**

Operation of farm, *Britt v. Britt*, 303.

**RAPE**

Evidence sufficient, *S. v. Bullard*, 718.

Sleeping victim, *S. v. Moorman*, 594.

Variance between indictment and proof, *S. v. Moorman*, 594.

**REAL ESTATE AGENT**

Constructive fraud in sale to customer, *Spence v. Spaulding and Perkins, Ltd.*, 665; *Sanders v. Spaulding and Perkins, Ltd.*, 680.

Erroneous description of boundaries, *Howell v. Waters*, 481.

**REAL ESTATE SALES CONTRACT**

Conditions as repudiation, *Beeson v. McDonald*, 669.

Failure to close in reasonable time, *Furr v. Carmichael*, 634.

**RECEIVERS**

Failure to allocate fees among corporations, *Lowder v. All Star Mills, Inc.*, 470.

**RECORDATION**

Between parties exception inapplicable, *Schiller v. Scott*, 90.

**RECORDS**

Production of by insurance claimant, *Moore v. N. C. Farm Bureau Mut. Ins. Co.*, 617.

**REGRAIDING TO IMPROVE ACCESS**

No taking of property, *Dept. of Transportation v. Higdon*, 752.

**RESCISSION**

Mutual mistake as to boundaries, *Howell v. Waters*, 481.

**RESTRICTIVE COVENANTS**

Beach access walkway and parking, *White v. Town of Emerald Isle*, 392.

Standing to enforce, *Laurel Park Villas Homeowners Assoc. v. Hodges*, 141.

**RESULTING TRUST**

Unavailable for undue influence, *Brisson v. Williams*, 53.

**ROOF**

Damage to temporary, *E. L. Scott Roofing Co. v. State of N. C.*, 216.

**SALESMAN'S STATEMENT**

No express warranty, *Tyson v. Ciba-Geigy Corp.*, 626.

**SANITARIANS**

Certification, *King v. N. C. State Bd. of Sanitarian Examiners*, 409.

**SEARCH AND SEIZURE**

Automobile at police station, *S. v. White*, 358.

Consent by driver stopped for traffic violation, *S. v. Roberts*, 733.

Stereo equipment observed in parked automobile, *S. v. White*, 358.

Warrantless search of person and automobile, *S. v. Alston*, 372.

**SEARCH WARRANT**

Oral statements unrecorded, *S. v. Teasley*, 150.

Sufficiency of affidavit to show probable cause, *S. v. Teasley*, 150.

**SELF-DEFENSE**

Refusal to give requested instruction, *S. v. Hughes*, 724.

**SENTENCING**

Defendant's right to make a statement, *S. v. Newton*, 555.

No reduction for help in convicting drug offenders, *S. v. Teasley*, 150.

**SEPARATION**

Right to life insurance proceeds, *Benfield v. Pilot Life Ins. Co.*, 293.

**SEPARATION AGREEMENT**

Child support, *Bottomley v. Bottomley*, 231.

Oral modification of college expenses provision, *Altman v. Munns*, 102.

Waiver of breach relating to college expenses, *Altman v. Munns*, 102.

**SEXUAL OFFENSE**

Anal intercourse with college student, *S. v. Moorman*, 594.

**SHACKLED DEFENDANT**

No prejudice, *S. v. Wright*, 450.

**SHAREHOLDER DERIVATIVE ACTION**

Annual increase in hourly rate for attorney fees, *Lowder v. All Star Mills, Inc.*, 470.

Merit bonus for attorneys, *Lowder v. All Star Mills, Inc.*, 470.

Variation in attorney rates, *Lowder v. All Star Mills, Inc.*, 470.

**SHOPLIFTING SUSPECT**

Injury from fleeing, *Jones v. Lyon Stores*, 438.

**SPECIFIC PERFORMANCE**

Subdivision amenities, *Lyerly v. Malpass*, 224.

**STATE AIRCRAFT**

Alleged misuse of, right to bring action, *Flaherty v. Hunt*, 112.

**STATUTE OF LIMITATIONS**

Amendment to complaint, *Stevens v. Nimocks*, 350.

Permanent redress of encroachment on realty, *Williams v. South & South Rentals*, 378.

**SUBCONTRACTORS**

Lien, *Queensboro Steel Corp. v. East Coast Machine & Iron Works*, 182.

**SUBDIVISION**

Amenities, *Lyerly v. Malpass*, 224.

**SUBPOENAS DUCES TECUM**

Children's home records, *S. v. Newell*, 707.

**SUDDEN EMERGENCY**

Instruction unsupported by evidence, *Masciulli v. Tucker*, 200.

**SUICIDE**

Attempt by motorcyclist involved in collision, *McNabb v. Town of Bryson City*, 385.

**SUMMARY JUDGMENT**

Motion previously heard by another judge, *Furr v. Carmichael*, 634.

Partial, appealability of, *Schuch v. Hoke*, 445.

**TAKING**

Regrading to improve access, *Dept. of Transportation v. Higdon*, 752.

**TAPE RECORDED CONVERSATION**

Admission not prejudicial, *S. v. Hurst*, 1.

**TAXATION**

Trust income, *NCNB v. Powers*, 540.

**TERMINATION OF  
PARENTAL RIGHTS**

Abandonment by father, *In re Adoption of Searle*, 273.

Caption of petition, *In re Manus*, 340.

Failure to pay portion of cost of care, *In re Manus*, 340.

Neglect of child, *In re Stewart Children*, 651.

Past conditions, *In re Manus*, 340.

Prior finding of neglect, *In re Stewart Children*, 651.

**TORT CLAIMS ACT**

Decision not to erect guardrail, *Hochheiser v. N. C. Dept. of Transportation*, 712.

**TRACTOR-SWEEPER**

Collision when visibility reduced by dust, *Allen v. Pullen*, 61.

**TRUCK**

Bob-tail insurance, *Reeves v. B&P Motor Lines, Inc.*, 562.

**TRUSTS**

Constructive trust for breach of confidential relationship of husband and wife, *Brisson v. Williams*, 53.

Intangibles tax, *NCNB v. Powers*, 540.

Resulting trust unavailable for undue influence, *Brisson v. Williams*, 53.

**UNEMPLOYMENT COMPENSATION**

Leaving work after notice of termination date, *In re Poteat v. Employment Security Comm.*, 138.

**UNFAIR TRADE PRACTICE**

Real estate brokers, *Spence v. Spaulding and Perkins, Ltd.*, 665.

Refusal to pay fire insurance claim, *Moore v. N. C. Farm Bureau Mut. Ins. Co.*, 617.

**VEHICLE MILEAGE ACT**

Private enforcement, *McCracken v. Anderson Chevrolet-Olds, Inc.*, 521.

**VERDICTS**

Inconsistent for two defendants, *S. v. Bullard*, 718.

**VISITATION**

Interference with, *Woncik v. Woncik*, 244.

**VOLUNTARY DISMISSAL**

Counterclaim pending, *Smith v. Williams*, 672.

**VOLUNTARY INTOXICATION**

Refusal to instruct, *S. v. Hurst*, 1.

**WAIVER OF COUNSEL**

Parole revocation hearing, *S. v. Warren*, 84.



**WITNESSES**

Opinion as to credibility of victim, *S. v. Holloway*, 586.

Record of commitment proceedings, *In re Will of Leonard*, 646.

**WORKERS' COMPENSATION**

Asbestosis, *Long v. N. C. Finishing Co.*, 568.

Award for blurred and double vision, *Stanley v. Gore Brothers*, 511.

Byssinosis claim denied, *Clark v. American & Efird Mills*, 192; *Knight v. Cannon Mills Co.*, 453.

Claim barred by res judicata, *Stanley v. Gore Brothers*, 511.

Credit for company disability benefits, *Foster v. Western Electric Co.*, 656.

Fall not proximate cause of death, *Pickrell v. Motor Convoy, Inc.*, 238.

**WORKERS' COMPENSATION****—Continued**

Heart attack, *Dillingham v. Yeargin Construction Co.*, 684.

Loss of smell and damage to facial nerves, *Stanley v. Gore Brothers*, 511.

Loss of vision, *Jackson v. L. G. DeWitt Trucking Co.*, 208.

Motion to reopen case denied, *Cook v. Southern Bonded, Inc.*, 277; *Pickrell v. Motor Convoy, Inc.*, 238.

**ZONING**

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